IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 20

JOYCE C. THORPE,

Petitioner,

—v.—

HOUSING AUTHORITY OF THE CITY OF DURHAM.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Supreme Court of North Carolina (A. 38-42), is reported at 271 N.C. 468, 157 S.E.2d 147 (1967). The judgment of the Superior Court of Durham County, including findings of fact and conclusions of law (A. 19-23), is unreported. The original decision of the Supreme Court of North Carolina (A. 26-28), is reported at 267 N.C. 431, 148 S.E.2d 290 (1966). The opinion of this Court vacating that decision is reported at 386 U.S. 670.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered October 11, 1967.[1] The petition for writ of

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[1] October 11, 1967, is the date of the opinion and judgment given in the report of the decision, see 157 S.E.2d 147. The record

pp. 26a-27a. On April 17, 1967, this Court rendered a *per curiam* decision remanding the case to the Supreme Court of North Carolina for reconsideration in light of the circular. *Thorpe* v. *Housing Authority*, 386 U.S. 670. Subsequently, in October, 1967, the circular was incorporated in the Department's "Low-Rent Housing Management Manual," the provisions of which, under Department regulations, are binding on local authorities. See Appendix IV, *infra*, p. 35a.

On October 11, 1967, the North Carolina Supreme Court entered its decision on remand, and again found no error in the order of eviction of petitioner. In its opinion, the court below again relied on the provision of the lease which allowed the Housing Authority to terminate the lease on fifteen days' notice. As to petitioner's claim that she had been evicted because of her election as president of a tenants' organization, the Court said:

> The timing of the club election and the service of the ejection notice might arouse suspicion if the activities of the club were shown to have been hostile to the Authority. Without such showing and in the face of positive testimony of the Manager to the contrary, the charge is based altogether on coincidence. The timing may arouse suspicion, but to the judicial mind, suspicion is never a proper substitute for evidence. (A. 40).

As to the applicability of the February 7, 1967, HUD circular (the issue to be determined under this Court's remand order), the North Carolina Supreme Court held that the circular was inapplicable solely because it was issued some 17 months after the notice of eviction to petitioner. (A. 41-42).

Petitioner has not been removed from her apartment but continues to remain in the housing project under a stay of the eviction order granted by the court below pending decision in this Court. Petitioner has never, after nearly three years, been told the reason for her eviction.

Summary of Argument

A municipal housing authority, acting as the agent of both the state and federal governments, is prohibited by the due process clauses of the Fifth and Fourteenth Amendments from evicting a public housing tenant without giving the tenant timely notice of the reasons for eviction and a fair opportunity to contest the legal and factual adequacy of those reasons. Petitioner's case arises in the context of her assertion that she was evicted because of her exercise of the First Amendment right to freedom of association.

This case involves one basic question: Are petitioner and her family—and hundreds of thousands of others living in public housing—to be subject to the arbitrary and uncontrolled power of petty bureaucrats in their enjoyment of a basic necessity of life? Can Mrs. Thorpe and her children be thrown into the street and relegated to the slum, contrary to the purposes of the public housing programs, on the basis of an administrator's decision that is supported by no announced reason, that may be based on no reason whatever, or that may be based on an effectively concealed impermissible reason such as retaliation for tenants' organizing activities?

I.

The Housing Authority of the City of Durham is subject to constitutional limitations. For example, denial of public housing benefits on the ground of race or reli-

certiorari, filed January 9, 1968, was granted March 4, 1968, —— U.S. ——, 19 L.ed.2d 1130 (A. 47). Jurisdiction of this Court rests on 28 U.S.C. §1257(3), petitioner having asserted below and here the deprivation of rights secured by the Constitution and statutes of the United States.

Questions Presented

Petitioner and her children have been tenants in a low-income housing project constructed with federal and state funds and administered by the Housing Authority of the City of Durham, an agency of the State of North Carolina, pursuant to federal and state laws and regulations. The day after petitioner was elected president of a tenants' organization in the project, the Housing Authority gave notice that it was cancelling her lease. The Housing Authority refused to give her a reason or a hearing but initiated this summary ejectment action in a state court and obtained an order that petitioner be removed from the premises.

1. Under these circumstances, was petitioner denied rights guaranteed by the First Amendment and by the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Was petitioner entitled to notice of the reasons for her eviction and a hearing on those reasons by virtue of a directive promulgated on February 7, 1967, by the United States Department of Housing and Urban Development?

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from the Supreme Court of North Carolina gives the date of the entry of the judgment and the filing of the opinion as October 23, 1967 (A. 37, 42).

Constitutional and Statutory Provisions Involved

This case involves the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the United States Housing Act, as amended, 42 U.S.C. §§1401 *et seq.* The following portions of the Housing Act are set forth in Appendix I, *infra,* pp. 1a-7a:

42 U.S.C. §1401
42 U.S.C. §1404a
42 U.S.C. §1408
42 U.S.C. §1410(g)
42 U.S.C. §1415(7)
42 U.S.C. §1434.

This case also involves directives promulgated by the United States Department of Housing and Urban Development under authority of the above statutes, which are set forth in Appendix IV, *infra,* at pp. 26a-27a; 31a-35a.

This case also involves the North Carolina Housing Authorities Law, Gen. Stats. of North Carolina, §§157-1 *et seq.* The following portions of the "Housing Authorities Law" are set forth in Appendix II, *infra,* pp. 8a-20a.

N.C.G.S. §157-2
N.C.G.S. §157-4
N.C.G.S. §157-9
N.C.G.S. §157-23
N.C.G.S. §157-29

The case also involves North Carolina statutes relating to summary ejectment proceedings, Gen. Stats. of North

Carolina, §§42-26 *et seq.* The following sections are set forth in Appendix III, *infra*, pp. 21a-25a.

N.C.G.S. §42-26
N.C.G.S. §42-28
N.C.G.S. §42-29
N.C.G.S. §42-30
N.C.G.S. §42-31
N.C.G.S. §42-32
N.C.G.S. §42-34

Statement

On November 11, 1964, petitioner and her children became tenants in McDougald Terrace, a federally assisted low-rent public housing project owned and operated by the Housing Authority of the City of Durham, an agency of the State of North Carolina. The lease agreement under which petitioner has occupied the project had an initial term from November 11, to November 30, 1964 (A. 11). The lease further provided that it would thereafter be automatically renewed for successive terms of one month at a rental of $29 per month, as long as there was no change in her income or family composition or violation of the terms of the lease (A. 12).

The Housing Authority of the City of Durham was established under North Carolina law and is "a public body and a body corporate and politic, exercising public powers," Gen. Stat. of N.C. §157-9. The Authority has "all the powers necessary or convenient to carry out and effectuate the purposes and provisions" of the North Carolina Housing Authority law (§§157-1 *et seq.*, Gen. Stat. of N.C.), including the powers "to manage as agent of any city or municipality . . . any housing project constructed or owned by such city" and "to act as agent for the fed-

eral government in connection with the acquisition, construction, operation and/or management of a housing project," Gen. Stat. of N.C. §157-9. The Housing Authority operates McDougald Terrace as a low-rent housing project "under its statutory authority and pursuant to its contract with the Federal government" (A. 5).

On August 10, 1965, petitioner was elected president of the Parents' Club, a group composed of tenants of the McDougald Terrace project (A. 6). The following day, August 11, 1965, the Housing Authority, through its executive director, delivered a notice that petitioner's lease would be cancelled effective August 31, 1965, at which time she would have to vacate the premises (A. 5-6); petitioner received this notice on August 12, 1965 (A. 6). In the notice the Authority gave no reasons for the sudden cancellation but merely mentioned a provision of the lease that it claimed permitted the landlord to cancel upon fifteen days' notice (A. 18).[2]

After she received the notice, petitioner, through her attorneys, by phone and by letter requested to be told the reasons for her eviction; the request was denied (A. 9). For that reason, she refused to vacate. It was stipulated below that "although the Housing Authority had a meeting on the subject the defendant was not given a hearing in which she herself was present and reasons assigned to her" (A. 6). Her attorney met with the Housing Authority and its executive director on September 1, 1965, and the attorney again asked for a hearing but the request was denied (A. 9). Petitioner averred, on informa-

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[2] The text of the notice, dated August 11, 1965, is as follows:

> Your Dwelling Lease provides that the Lease may be cancelled upon fifteen (15) days written notice. This is to notify you that your Dwelling Lease will be cancelled effective August 31, 1965, at which time you will be required to vacate the premises you now occupy (A. 18).

tion and belief, that on September 1, 1965 the Housing Authority held a meeting with a police officer who supplied information allegedly obtained in an investigation of petitioner (A. 9). However, neither petitioner nor her attorney was present at this meeting, and she was not confronted with her accuser, informed of the information supplied to the Housing Authority, or given any opportunity to rebut any charges made against her (A. 9).

In evicting petitioner without giving a reason or a hearing, the Housing Authority relied on a sentence in the lease which provides that: "The Management may terminate this lease by giving to the Tenant notice in writing of such termination fifteen (15) days prior to the last day of the term" (A. 12). The lease, prepared by the Housing authority, also contained a variety of other provisions for termination. One provision states that the lease "shall be automatically terminated at the option of the Management" with an immediate right of reentry and waiver of all notices required by law, if the tenant misrepresents a material fact in his application or if "the Tenant fails to comply with any of the provisions of this lease" (A. 16). Among the enumerated provisions of the lease which a tenant must comply with, and which might support termination of the lease in the event of noncompliance, are agreements by the tenant, *inter alia,* to pay rent when due; to pay for damages to the premises; to pay a penalty for excess consumption of electricity, gas or water; not to assign the lease or sublet or accommodate boarders or lodgers or use the premises other than as a dwelling for the tenant and his family; to keep the premises in "a clean and sanitary condition"; to "maintain the yard in a neat and orderly manner"; to "assist in the maintenance of the project"; "not to use the premises for any illegal or immoral purposes"; "not to keep dogs or other pets"; not to make repairs or alterations

without consent; "to follow all rules or regulations prescribed by the Management concerning the use and care of the premises"; to permit the management to enter for repairs, etc.; to submit an annual income statement to the management; and to notify the management "of any increase or decrease in family income or of any change in family composition or assets" (A. 13-14). Another section of the lease allows the management to terminate on 30 days' notice at the end of any calendar month if the tenant's income "exceeds the limits established for eligible occupancy" (A. 15). Still another section provides that the tenant will "promptly" vacate the premises if he falsely warrants that neither he nor any person who is to occupy the premises is a member of an organization listed as subversive by the Attorney General of the United States, or if he becomes a member of such an organization (A. 17).

On September 17, 1965, the Housing Authority instituted a summary ejectment action against petitioner in the Justice of the Peace Court in Durham (A. 1-2). See Gen. Stats. of N.C. §§42-26 *et seq.*, Appendix III, *infra*, pp. 21a-25a. On September 20, the Justice of the Peace ordered that petitioner be removed from the premises (A. 4-5). Petitioner appealed to the Superior Court of Durham County (A. 4), where evidence was submitted in the form of a stipulation and petitioner's affidavit.

In the Superior Court petitioner filed a motion to quash the eviction proceedings and alleged therein that she had a right to her apartment and that a deprivation of that right without a hearing violated due process of law. Further, it was alleged that petitioner's eviction resulted primarily from her activities as an organizer of tenants (A. 10-11). These allegations were supported by petitioner's affidavit (A. 7-10). In a stipulation entered into between the attorneys for petitioner and the Housing Authority

(A. 5-7), it was stipulated, *inter alia,* that the Housing Authority did not give petitioner a reason for its termination of the lease, nor did it give her a hearing despite her request for one; that on August 10, 1965, petitioner was elected president of the Parents Club and that the eviction notice was sent out on August 11; and that the executive director of the Housing Authority would testify, as he had testified before the justice of the peace, that

> . . . whatever reason there may have been, *if any,* for giving notice to Joyce C. Thorpe of the termination of her lease, it was not for the reason that she was elected president of any group organized in McDougald Terrace . . . and not for any of the other reasons set forth in the affidavit . . . (A. 7) (emphasis added).

Finally, it was stipulated that the action would be heard by the judge without a jury and that the judge could hear and determine the case by finding facts based on stipulations and affidavits, and by drawing therefrom conclusions of law. *Id.*

On the basis of the stipulation, the Superior Court made the finding:

> That the plaintiff Housing Authority of the City of Durham . . . gave notice to the defendant to vacate said premises not because she had engaged in efforts to organize the tenants of McDougald Terrace, nor because she was elected President of a group organized in McDougald Terrace on August 10, 1965; that these were not the reasons said notice was given and eviction undertaken (A. 21).

The Court went on to find that the Housing Authority gave no reason to petitioner for terminating the lease

and did not conduct any hearing at which petitioner was present or invited to be present to inquire into the reasons for terminating the lease and, further, that although petitioner requested a hearing, she had no hearing other than that "before the Justice of the Peace in this eviction action and in this Court" (A. 22). The Court then concluded as a matter of law that the Housing Authority of the City of Durham had no duty to hold a hearing on the subject of petitioner's eviction or to communicate or give to petitioner any reason for the termination. Thus, the Court affirmed the judgment of eviction (A. 23).

On appeal to the Supreme Court of North Carolina, the judgment was affirmed on the ground that the Authority was the owner of the premises and had terminated the tenancy in accord with the terms of the lease. The Court held, in effect, that the Authority was under no obligation to conduct a hearing or advise the tenant of its reasons for terminating the lease, since its obligations to its tenants were the same as the obligations of a private landlord. Thus, the Court said:

> *It is immaterial what may have been the reason* for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease (A. 28) (emphasis added).

Petitioner then filed in this Court a petition for writ of certiorari, which was granted December 5, 1966. While the case was pending in this Court, the United States Department of Housing and Urban Development, on February 7, 1967, promulgated a circular dealing with the duty of local housing authorities to inform tenants of the reasons for any eviction and to give tenants an opportunity to make a reply or explanation. See Appendix IV, *infra*,

gion, or as retaliation for the exercise of First Amendment freedoms, would violate the Constitution. Similarly, the Housing Authority could not place conditions upon providing benefits which operate to deter or infringe the exercise of rights and freedoms guaranteed by the Constitution. *Sherbert* v. *Verner*, 374 U.S. 398, 404. Moreover, the Fourteenth Amendment requires that the action of a government agency be rationally related to the purposes of the statute under which it operates. Finally, government action affecting vital interests may not be arbitrary in the sense of being without factual foundation. See *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir. 1961), *cert. denied*, 368 U.S. 930; *Rudder* v. *United States*, 226 F.2d 51, 53 (D.C. Cir. 1955).

Since certain kinds of reasons for termination of petitioner's lease are impermissible, it follows that petitioner must be told the basis for her eviction. Notice of the reasons offers a possibility of relief if an official is mistaken about the facts and he or some reviewing authority can be persuaded that he is mistaken, or if the official is mistaken about the law and it can be shown that the proposed action violates the law, or if the official acts contrary to policy established by superior administrative officials. A requirement that the housing agency state its reasons for terminating low-income benefits serves the salutary function of requiring that the agency act responsibly and actually have a reason. The importance of the requirement as a check against evictions based on constitutionally impermissible or arbitrary grounds is particularly evident in this case, where petitioner was given her notice one day after her election as president of a tenants' organization, a circumstance of timing that the court below admitted raises the suspicion at the least of retaliatory eviction.

Certainly, the Authority has no substantial interest to be served by keeping its reasons secret, and secrecy does nothing to further the purposes of the state-federal program to provide housing assistance to the poor. Moreover, an integral part of procedural due process is notice sufficiently specific to apprise the individual affected of the nature of the charges against him. Without such notice, the tenant is incapable of asserting his rights. Since petitioner has yet to be informed of the basis for the termination of her lease, she may not, consistently with due process, be evicted by the Authority.

Petitioner was not only denied adequate notice, but also a fair opportunity to contest the legal and factual adequacy of the Housing Authority's decision to terminate her lease. Due process requires that petitioner be given a fair opportunity to be heard to contest the Authority's action cancelling her low-income housing benefits. Petitioner's interest that has been adversely affected by the Authority involves the difference between living in a low-cost, sanitary stable environment and being relegated to the slums. On the other hand, the Authority's policy of secrecy serves no public interest. Due process requires, at the least, that petitioner have the right to subject the rationale of the Authority's action to scrutiny. *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96. While the Constitution may allow considerable flexibility and variation in the form and forum of the hearing, the hearing should include at least the opportunity to present evidence and argument, to confront opposing witnesses, and effectively to present the tenant's own version of the facts, with the decision based on the facts presented.

Mrs. Thorpe has never been informed of the reasons for the termination of her lease, and she has never received a hearing on the precise issue involved—the rea-

sons for the Authority's action and the factual basis, if any, to support its reasons. The summary eviction proceedings before the Justice of the Peace and the trial *de novo* in the Superior Court did not, and could not, provide the type of hearing required by constitutional due process. In the lower courts, the case was tried under the provisions of the state summary ejectment statutes, and the sole issue was whether petitioner, as a tenant, was holding over after her term had expired. Accordingly, there was no inquiry as to the reasons for the termination of petitioner's lease. Even if petitioner could somehow have discovered the reasons at the trial, this would not have afforded constitutionally adequate notice of the nature of the charges against her. The only fair procedure is to give the tenant *prior* notice, thus affording the tenant an opportunity to investigate, contact witnesses, and properly prepare his case. Disclosure for the first time in court of the Housing Authority's reasons for evicting petitioner, even if possible, could not cure the refusal to give a reason at the time her benefits were cancelled.

II.

The judgment below must be reversed because the February 7, 1967, circular of the Department of Housing and Urban Development requires that no tenant be given notice to vacate without being told by the local housing authority the reasons for the eviction and given an opportunity to challenge the reasons and the factual basis of the reasons. The Authority in this case has not complied with the circular, despite the fact that petitioner is still occupying her apartment and has never been told the reasons for her eviction.

This Court remanded the case to the North Carolina Supreme Court for reconsideration in light of the circular, but that Court reaffirmed its earlier decision upholding petitioner's eviction on the sole ground that the circular was not applicable to this case. However, the meaning of the circular is clear, the circular is mandatory and binding on local housing authorities, the Department of Housing and Urban Development has the requisite legal authority to issue the circular, and the new procedural rules prescribed by the circular should be applied to this case.

The circular requires that a tenant be served with a sufficiently specific notice of the reasons for his eviction and of the factual basis for the reasons, prior to the service of a notice to vacate. The opportunity to be heard which the circular affords public housing tenants should be interpreted to include the right to be heard in person or by counsel at a hearing or conference, and also to include fair opportunities to challenge the grounds of the local authority's proposed action, to probe the facts relied upon by the authority, and to present the tenant's own version of the facts. The circular should also be interpreted to include the requirement that the authority's decision be premised on the facts presented to it.

The circular should be applied to this case because it was issued while this case was pending on direct review. The generally applicable principle is that procedural changes of law will be applied to pending litigation, and the court will apply the law as it exists at the time the court is called upon to decide the pending case. Moreover, new law affecting substantive rights may be applied where it would effectuate the purpose of the new and more enlightened policy.

ARGUMENT

I.

The Constitution of the United States Prohibits the Eviction of a Public Housing Tenant by the Housing Authority Without Giving the Tenant Notice of the Reasons for Eviction and a Fair Opportunity to Contest the Legal and Factual Adequacy of Those Reasons.

Introduction

This case involves the question of whether a municipal housing authority, acting as the agent of both the state and federal governments, violates the due process clauses of the Fifth and Fourteenth Amendments[3] when it terminates housing benefits it is charged by law to furnish to a citizen without affording the citizen either a statement of the reason for cancellation or a hearing on the legal or factual adequacy of the reason. The case arises in the context of an assertion by petitioner that she was evicted because of her exercise of First Amendment rights to freedom of association.

Although it is beyond question that the Housing Authority of the City of Durham is a governmental agency

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[3] The Due Process Clause of the Fourteenth Amendment applies to the Housing Authority of the City of Durham because it is a state agency, established and operated in accordance with state law (A. 5; Gen. Stats. of N.C. §157-9). The Due Process Clause of the Fifth Amendment is also applicable because the Authority acts as an "agent for the federal government" (Gen. Stats. of N.C. §157-9) in the operation and management of the housing project pursuant to a contract with the Federal Government (A. 5). By law the Authority is a "public body and a body corporate and politic, exercising public powers" (Gen. Stats. of N.C. §157-9) (App. II, *infra*, pp. 12a-17a). See the concurring opinion of Mr. Justice Douglas when this case was first before this Court, 386 U.S. at 674.

subject to the restraints of the Constitution, the Supreme Court of North Carolina, on remand from this Court, basically adhered to its earlier decision that the Authority need afford no procedural protection to a tenant whom it wishes to evict. The state court thus sanctioned and enforced the Authority's action cancelling, at its mere will or whim, petitioner's benefits under the public housing laws. The Court's decision on remand left untouched the basic reasoning of the prior North Carolina decisions—that petitioner had no rights to the housing except those conferred by her lease; that under the lease the Authority had the right to terminate; and that the Authority had no duty to communicate its reason, if any, for terminating her tenancy or to give her any hearing (A. 28).

There is thus no basis for assuming that the Authority acted on any reasonable ground. Rather, it has successfully tested its power to be arbitrary, capricious and unreasonable. This is, we submit, the net effect of the proceedings below, which included: (1) petitioner's affidavit that she was evicted the day after she was elected President of a tenants' organization and that she believed the reason was an official's opposition to her effort to organize tenants (A. 8); (2) the official's stipulated testimony that his reason "if any," was not the reason alleged by petitioner (A. 7); (3) the trial judge's decision that the authority had no "duty to communicate or give . . . any reason" (A. 23); (4) the first decision of the North Carolina Supreme Court that the reason "is immaterial" (A. 28); and (5) its second decision refusing to hold that the HUD circular gave petitioner any right to know the reason or to a hearing (A. 41-42). The case was viewed by the parties and the courts below as a test of the right of the Authority to evict arbitrarily and without any reason, any statement of a reason, or any hearing on the reason or lack of a reason.

Petitioner urges in detail below that the result reached in the state courts is inconsistent with the requirements of due process. We submit, first, that the Constitution precludes arbitrary, discriminatory or capricious action to withhold from an individual the benefits of the state-federal public housing program for the poor. Second, we urge that a minimum necessary protection against arbitary action is that the Housing Authority be required to reveal the reason for its action. Third, we submit that due process requires that tenants in low-income governmentally operated projects be given a fair opportunity to be heard to contest the factual or legal basis for the government's eviction orders. And, fourth, we submit that the proceedings below did not comport with these requirements of due process.

We believe it appropriate to present our views on the requirements of due process first, rather than discussing initially, or relying solely upon, the February 7, 1967, circular of the Department of Housing and Urban Development, which was the basis of this Court's remand on the prior appeal. We urge that for a full and final disposition of this case it must be considered in light of constitutional principles. This Court first granted certiorari to decide these constitutional questions. Even though a federal directive has intervened, these issues are still ripe for decision. The circular does require that petitioner be told the reasons for her eviction and be given an opportunity to be heard. But, as will be shown in Part II of this brief, it does not, in and of itself, settle the constitutional questions involved here, unless the circular is construed by this Court in several important aspects consistently with constitutional requirements. Thus, either this Court must resolve the constitutional issues themselves or it must construe and apply the HUD circular in a fashion informed by the governing principles of due process.

A. The Constitution Prohibits Arbitrary, Discriminatory or Capricious Action by the Housing Authority in Terminating a Tenant's Benefits under the Public Housing Laws.

The government, acting as landlord, dispenser of benefits, or in any other capacity, is subject to certain constitutional limitations. It is manifest, for example, that denial of benefits on the ground of race violates the Constitution. This principle has frequently been applied to racial discrimination in public housing, despite the government's status as "landlord." *Detroit Housing Commission* v. *Lewis*, 226 F.2d 180 (6th Cir. 1955); *Jones* v. *City of Hamtramck*, 121 F. Supp. 123 (E.D. Mich. 1954); *Vann* v. *Toledo Metropolitan Housing Authority*, 113 F. Supp. 210 (N.D. Ohio 1953); *Banks* v. *Housing Authority of City and County of San Francisco*, 120 Cal. App.2d 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 974; *Taylor* v. *Leonard*, 30 N.J. Super. 116, 103 A.2d 632 (1954).[4]

Similarly, the government may not, in any capacity, place conditions upon providing benefits which operate to deter or infringe the exercise of rights and freedoms guaranteed by the Constitution. See, *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 404, where this Court stated (with respect to the denial of unemployment compensation):

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. American Communications Ass'n. v. Douds, 339 U.S. 382, 390; Wiemann v. Updegraff, 344 U.S.

[4] See also, Executive Order No. 11063, 27 Fed. Reg. 11527 (1962), prohibiting racial discrimination in federally-assisted housing. And see Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C., Sec. 2000d, and the implementing regulations (24 C.F.R., Subtitle A, Part I), prohibiting discrimination in federally-assisted programs, including low-rent housing projects.

183, 191, 192; Hannegan v. Esquire, Inc., 327 U.S. 146, 155, 156 . . . In Speiser v. Randall, 357 U.S. 513, *we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms.* (Emphasis added.)[5]

This principle, too, has been applied to public housing. It has been held that public housing authorities may not deny the benefits of public housing to persons solely because of their exercise of guaranteed rights of free speech and association.[6] *Holt* v. *Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D. Va. 1966); *Rudder* v. *United States*, 226 F.2d 51 (D.C. Cir. 1955); *Kutcher* v. *Housing Authority of Newark*, 20 N.J. 181, 119 A.2d 1 (1955); *Housing Authority of Los Angeles* v. *Cordova*, 130 Cal. App.2d 883, 279 P.2d 215 (App. Dep't. Super. Ct. 1955); *Lawson* v. *Housing Authority of City of Milwaukee*, 270 Wis. 269, 70 N.W.2d 605 (1955), *cert. denied*, 350 U.S. 882; *Chicago Housing Authority* v. *Blackman*, 4

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[5] The doctrine prohibiting the imposition of unconstitutional conditions is not limited to the above cases, *Torcaso* v. *Watkins*, 367 U.S. 488; *Shelton* v. *Tucker*, 364 U.S. 479; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100; *Slochower* v. *Bd. of Higher Educ.*, 350 U.S. 551, 555; *Wiemann* v. *Updegraff*, 344 U.S. 183, 191 (all public employment), or to cases involving the First Amendment. See, *e.g.*, *Frost Trucking Co.* v. *R. R. Comm.*, 271 U.S. 583 (use of public highways); *Hanover Fire Insurance Co.* v. *Carr*, 272 U.S. 494 (foreign corporations doing business in a State). See generally, O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, 54 Calif. L.Rev. 443 (1966).

[6] Petitioner has contended throughout this case that termination of her lease was, in fact, an unconstitutional reprisal for exercise of First Amendment rights. But there has never been an adequate determination on the free speech issue, since the Housing Authority has never apprised petitioner of the reasons for termination or afforded her a hearing on the reasons. See part I (D) of this brief, *infra*.

Ill.2d 319, 122 N.E.2d 522 (1954). This principle was also recognized by Justices Douglas and White when this case was first before the Court. The only members of the Court to address themselves to the issue, they were of the opinion that there are reasons for which the Authority could not terminate petitioner's lease, and that her exercise of First Amendment rights is one of them. 386 U.S. at 678-679.

Moreover, the Fourteenth Amendment requires that the action of government be rationally related to the purposes of the legislation. Thus, in *Gulf, Colorado and Santa Fe Ry.* v. *Ellis*, 165 U.S. 150, 155, this Court held that a classification

> . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

See also, *Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663. This principle, too, is applicable to public housing. The essential purpose of all low-income housing legislation is "to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low-income. . . ."[7] Action taken to deny the benefits of low-income housing must be rationally related to that purpose or its implementation. Thus, in *Thomas* v. *Housing Authority of the City of Little Rock*, —— F. Supp. —— (E.D. Ark., C.A. No. LR-66-C-230, May 26, 1967), the housing authority's action denying access to public housing on the ground that the applicant had an illegitimate child was held unconstitutional in that

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[7] 42 U.S.C., §1401 App. I, *infra*, p. 1a; see also, General Statutes of North Carolina, Section 157-2; App. II, *infra*, p. 8a.

there was no rational connection between that ground and the purposes of the legislation.

It is clear that the claim of arbitrary power asserted by Respondent is also inconsistent with the expressed purposes of the state-federal low-income housing program. The policy of the United States is:

> . . . to promote the general welfare of the Nation by employing its fund and credit, . . . to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban and rural nonfarm areas, that are injurious to the health, safety, and morals of the citizens of the Nation. 42 U.S.C. §1401.

The North Carolina enactment contains an even more detailed declaration of the necessity of the program for low-income housing to correct conditions which it found "cannot be remedied by the ordinary operation of private enterprise." Gen. Stats. N.C. §157-2 (App. II; *infra*, p. 8a).[8] Indeed, there must be specific findings as to the need for low income housing in order for a municipality to establish a housing authority under the North Carolina law (Gen. Stats. N.C. §157-4), or for such an authority to obtain federal funds (42 U.S.C. §1415(7)). The state and federal statutory schemes make it plain that the public housing agencies are not acting as private landlords, furnishing housing as business proprietors. The program is rather an exercise of the general governmental power to protect the health, safety, and welfare of an economically disadvan-

[8] See also the similar declarations in Gen. Stats. of N.C. §§157-40, 157-48.

taged segment of the citizenry.[9] The initiation of the program rested on explicit recognition of the fact that without public housing large numbers of persons would be condemned to live in urban and rural slums, suffering all the indignities and despair stemming from unsafe, overcrowded and unsanitary dwellings.[10] Surely, the power to exclude persons arbitrarily and without reason from the benefits of the housing program cannot be reconciled with these enunciated purposes and concerns.

This conclusion is supported by the fact that there is nothing in either the federal[11] or state acts[12] creating the publicly supported low-income housing program administered by the Durham Authority which confers such an arbitrary power to evict or otherwise withhold the benefits of the program. Neither of the two provisions of the federal law which authorize the local agencies to require

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[9] As stated in *Powell* v. *Eastern Carolina Regional Housing Auth.*, 251 N.C. 812, 112 S.E.2d 386, 387, "The Legislature authorized the creation of housing authorities as a means of protecting low-income citizens from unsafe or unsanitary conditions in urban or rural areas, G.S. §157-2."

[10] Gen. Stats. of N.C. §157-2 (App. II, *infra*, p. 8a), "the existence of conditions which endanger life or property by fire and other causes," and that "these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens. . . ." The accuracy of the legislative judgment has unfortunately been emphasized by the devastating ghetto riots and civil disorders of the recent past. Grievances relating to inadequate ghetto housing ranked with police practices and unemployment and under-employment at the first level of intensity in the cities struck by severe disorders. See *Report of the National Advisory Commission on Civil Disorders*, p. 143 (Bantam ed. 1968).

[11] The United States Housing Act of 1937, as amended, 42 U.S.C. §1401 *et seq.*, App. I, *infra*, pp. 1a-7a.

[12] The North Carolina "Housing Authorities Law," Gen. Stats. of North Carolina, §157-1 *et seq.*, App. II, infra, pp. 8a-20a.

tenants to move from low-income projects (42 U.S.C. §1410(g)(3) and 42 U.S.C. §1404a) grants arbitrary power; both provisions are related to a policy of limiting occupancy to low-income families. The only provision of the state Housing Authorities Law about tenant selection also refers only to the income limitation (Gen. Stats. N.C. §157-29). The text of 42 U.S.C. §1410(g)(3) (App. I, *infra*, p. 4a), makes plain that it relates only to enforcement of maximum income limitations in low-income projects.[13]

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[13] The provision, added in 1961, 75 Stat. 164 (Act of June 30, 1961, Section 205) states that federal contribution contracts must provide that local agencies make periodic reexaminations of tenants' incomes and require tenants above the maximum income limits to move from the project, except in special circumstances. The other provision, 42 U.S.C. §1404a, serves this same purpose, although the purpose becomes clear only from an examination of the legislative history. Section 1404a provides, *inter alia*:

> Notwithstanding any other provisions of law except provisions of law enacted after August 10, 1948 expressly in limitation hereof, *the Public Housing Administration, or any State or local public agency administering a low-rent housing project* assisted pursuant to this chapter or sections 1501-1505 of this title, *shall continue to have the right to maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action is authorized by the statute or regulations under which such housing accommodations are administered, and, in determining net income for the purposes of tenant eligibility* with respect to low-rent housing projects assisted pursuant to this chapter and sections 1501-1505 of this title, *the Public Housing Administration is authorized,* where it finds such action equitable and in the public interest, *to exclude amounts or portions thereof* paid by the United States Government for disability or death occurring in connection with military service. (Emphasis supplied.)

The history of the provision and of its statutory predecessor amply demonstrates that §1404a was enacted to allow eviction of tenants above the income limits for low-income projects; nothing in the legislative history supports the power asserted by the authority to evict without cause.

The quoted provisions of section 1404a were enacted in the Housing Act of 1948, Title V, §502(b), 62 Stat. 1284. This was a reenactment, with slight changes of wording, of a provision adopted

There is no indication that Congress made a judgment to grant arbitrary power. Cf. *Greene* v. *McElroy*, 360 U.S. 474. Nor are there any existing administrative regulations under either the federal or state legislation which confer the power to evict without accountabilty. The only administrative pronouncement directly bearing on the problem is the HUD circular of February 7, 1967, which requires local

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a year earlier in the Housing and Rent Act of 1947, Title II, §209(b), 61 Stat. 201.

Senator Ellender, who introduced the Section as an amendment, made clear that the purpose was to permit evictions to enforce the income limitations:

> "Mr. Buck. As I understand the amendment, it would permit the Housing Authority to remove from public housing units tenants who are now earning an income greater than that which would enable them to qualify for occupancy of low-cost public housing units?"
>
> "Mr. Ellender. That is correct . . . There are many tenants in some of the public housing projects at the moment who can pay an economical rent . . . [T]he purpose of the amendment is to make it possible for the authorities in charge of public housing to be able to evict those who are not entitled to be there." 93 Cong. Rec. 6044 (1947).

One month after the 1947 version was enacted, Congress passed a law allowing local agencies to postpone the commencement of eviction proceedings until March 1, 1948, if undue hardship would result for the occupants. Act of July 31, 1947, C. 418, §2, 61 Stat. 705 (formerly 42 U.S.C. §1413a).

As indicated, the 1948 version was basically a reenactment of the provision inserted in 1947. The 1948 version was proposed by a Senate subcommittee; the chairman made clear that it was a "provision for the eviction of over-income tenants." 94 Cong. Rec. 9867 (1948) (remarks of Senator McCarthy):

> ". . . [W]e also have a provision for the eviction of over-income tenants in the present 190,000 public housing units. We do not provide that they must be evicted instanter. We provide that the F.P.H.A., the local housing agency, shall evict them in an orderly manner, and I understand they have a program of evicting 5 per cent each month on 6 month's notice."

authorities to afford tenants notice and an opportunity to be heard.[14]

Finally, government action affecting vital interests may not be arbitrary in the sense of being without factual foundation. The Court of Appeals for the Fifth Circuit stated, with regard to school expulsions:

> The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case. *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961), *cert. denied* 368 U.S. 930.

Thus, even if a legitimate reason is advanced for denial of a benefit, due process requires that there be a factual foundation making the reason applicable to the specific individual. This principle, too, has been applied to public housing:[15]

> The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords it is subject to the requirements of due process of law. Arbitrary action is not due process. *Rudder* v. *United States*, 226 F.2d 51, 53 (D.C. Cir. 1955)

See, *In the Matter of Vinson* v. *Greenburgh Housing Authority* (App. Div., N.Y. Sup. Ct., 2nd Dept., March 11,

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[14] See Part II of this brief.

[15] In a letter responding to inquiries by one of the attorneys for petitioner, Mr. Don Hummel, Assistant Secretary for Renewal and Housing Assistance, over whose signature the February 7, 1967 circular issues, states:

> Certainly the housing authority may not terminate the lease 'for any reasons it feels appropriate' if such reasons are arbitrary or capricious. . . . (App. V, *infra*, p. 42a).

1968). (This case, as yet unreported, is reproduced in App. VI of this Brief, *infra*, pp. 45a-59a. It holds, on constitutional grounds, that notice of reasons for an eviction must be given.) Indeed, it is the principle forbidding arbitrary action which serves as the logical premise for the general rule that administrative and judicial determinations be supported by "evidence" after notice and a hearing on the issues. Cf. *Londoner* v. *Denver*, 210 U.S. 373.

The question here is whether, under these vital constitutional principles, a government agency may evict for no reason at all, or for an unreasonable, arbitrary and capricious reason, recognizing that the power to be capricious includes a practical power to act for reasons specifically forbidden by the Constitution. The answer to *that* question must be negative if there is to be any protection at all for the civil rights and civil liberties of public housing tenants. *Rudder* v. *United States, supra.* Otherwise, housing project managers would be granted "full authority to regulate the conduct of those living in the [project]." *Tucker* v. *Texas*, 326 U.S. 517, 519.

B. The Due Process Clause Prohibits the Authority from Terminating a Tenant's Public Housing Benefits without Giving any Notice of the Reasons for the Termination.

Since certain kinds of reasons for terminating petitioner's lease are impermissible, including race, religion, speech, association, illegitimacy, and purely arbitrary or capricious reasons, it follows that petitioner must be told the basis for the termination of her lease. It is necessary for petitioner to know what reasons are allegedly relied on in order to insure that impermissible reasons are not involved. If the Housing Authority is forced to disclose

a reason for termination, it might readily appear that the Authority is relying on an illegal or, an arbitrary or capricious reason, i.e., no reason at all. Even if the reason asserted appears on its face to be a permissible ground for termination, the affected individual must know it in order to contest the factual basis for applying that reason to him.[16]

Notice of reasons would at least offer a possibility of relief if an official is mistaken about the facts and he or some reviewing authority can be persuaded that he is mistaken, or if the official is mistaken about the law and it can be shown that the proposed action violates the law, or if the official acts contrary to policy established by superior administrative officials. A requirement that the housing agency state its reasons for terminating low-income benefits serves the salutary function of requiring that the agency act responsibly and actually have a reason. It is a protection against capricious action.

The Authority has no substantial interest to be served by keeping its reason secret. Such secrecy does nothing to further the purposes of the state-federal program to provide housing assistance to the poor. We have seen no proffered justification for a policy of secrecy. If the Housing Authority has a good reason for evicting a tenant, there is no impediment to its stating that reason and relying on it as the basis for eviction. There are no considerations of immediate danger to the public or of peril to the national security or other similar factors which might justify the Authority's reluctance to give

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[16] The tenant may even prove that the application is so lacking in factual foundation that it is probably a subterfuge for some illegal reason such as reprisal for exercise of a protected freedom. Cf. *Holt* v. *Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D. Va. 1966).

tenants notice of the reasons for eviction. The Authority's refusal to accord its tenants reasonable protection can only help to break the spirits of the evicted tenants, and of other members of the community familiar with the injustice, and increase the apathy and despair of the impoverished. The policy of secrecy serves only as a shield for arbitrariness. As Mr. Justice Frankfurter put it:

> Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been developed for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done. *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U.S. 123, 171-2 (concurring opinion).

The right to know a reason for official action is vital so long as there remains any conceivable method, however informal, of influencing that action. *Gonzales* v. *United States*, 348 U.S. 407, illustrates the point. In *Gonzales*, a draft registrant was held entitled to have a copy of an "advisory recommendation" made by the Department of Justice to his Selective Service Appeal Board, and to an opportunity to file a reply. Though there was no hearing before the appeal board and the statute involved was silent on the right to know the recommendations, the Court found that this right was implicit in the Act, "viewed against our underlying concepts of procedural regularity and basic fair play" 348 U.S. at 412.[17]

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[17] Cf. *Simmons* v. *United States*, 348 U.S. 397, finding a deprivation of the fair hearing required by the selective service law in the failure to furnish a fair resume of an adverse FBI report considered by the hearing officer.

The great value to a tenant of a rule requiring that the Housing Authority disclose its asserted justification for eviction is demonstrated by a recent case involving claims similar to petitioner's. In *Holt* v. *Richmond Redevelopment and Housing Authority,* 266 F. Supp. 397 (E.D. Va. 1966); a tenant sued under 42 U.S.C. §1983 to restrain his eviction from a public housing project on the ground that the authority's purpose was to punish him for his tenant-organizing activities. The Housing Authority answered by asserting that the reason for eviction was the plaintiff's failure to report all of his income in violation of a lease provision, and not his organizing activities. The plaintiff then proved the circumstances concerning his income and his organization's disputes with the Authority. The Federal District Court found that the Authority's asserted reason for eviction was unfounded, and that the actual reason was the tenant's constitutionally protected activity. The court restrained the eviction.

The procedure and rule of law followed by the courts below in this case stand in sharp contrast to *Holt*. The circumstances of petitioner's eviction—her notice coming one day after she had been elected president of a tenants' organization—raise a clear suspicion of reprisal, as the court below admitted on remand. In *Holt* the same fact was present. However, in *Holt,* the district court recognized that the only effective way to determine whether the First Amendment claim was valid was to find out whether there was any other supportable reason for the eviction. Thus, it required the project manager to give a reason and allowed him to be examined as to its basis. Here, no such requirement was imposed or procedure followed. Mrs. Thorpe was met simply with a bald and inscrutable denial that the reason for her eviction was her organizing activi-

ties. The director asserted that the reason, "*if any*," for the eviction was not the exercise of free speech. Neither the trial court nor the North Carolina Supreme Court required him to come up with any valid reason for the action: the reason, *if any*, was immaterial. This, of course, made it totally impossible for petitioner to conduct effective cross-examination or to present rebuttal evidence in order to lay the foundation for an inference that the purported reason was without foundation and the real reason was as she claimed. The rule of law thus followed by the courts below, if permitted to stand by this Court would render *Holt* meaningless and the right it declares nugatory. If a tenant cannot effectively get at and examine an asserted reason for an eviction, he is faced with insuperable difficulties in establishing a First Amendment claim.

It must be stressed that this result, totally obnoxious to fundamental rights, was precisely the reason the federal government in 1954 urged that local housing authorities adopt month-to-month leases of the sort employed by respondent in this case, and that they evict undesirables under their terms. At that time, the government wished to exclude persons who belonged to "subversive" organizations pursuant to the "Gwinn Amendment." [18] In response to a ruling of the Municipal Court of Appeals for the District of

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[18] The Gwinn Amendment was attached as riders to a series of appropriation acts. Act of Aug. 31, 1951, c. 376, Title I, §101, 65 Stat. 277. Act of July 5, 1952, c. 578, Title I, §101, 66 Stat. 403. Act of July 31, 1953, c. 302, Title I, §101, 67 Stat. 307. After 1954 it was not repeated in subsequent appropriation acts and so lapsed. It appeared as 42 U.S.C. §1411c, and provided:

> That no housing unit constructed under the United States Housing Act of 1937, as amended, shall be occupied by a person who is a member of an organization designated by the Attorney General: *Provided further*, That the foregoing prohibition shall be enforced by the local housing authority . . .

See *Rudder* v. *United States*, 226 F.2d 51, 52, n. 2 (D.C. Cir. 1955).

Columbia in *Rudder* v. *United States*, 105 A.2d 741 (1954), *reversed*, 226 F.2d 51 (D.C. Cir. 1955), the Public Housing Administration issued a circular urging the use of month-to-month leases so that persons could be evicted without a reason being given. This would permit evictions without allowing the tenant to defend against it on constitutional grounds. (The full text of the circular, dated July 28, 1954, is set out in Appendix IV, *infra*, pp. 29a-30a.) The problem that annoyed public housing officials in 1954 was "subversives"; the problem now is formerly docile poor people attempting to organize to assert their rights. In both instances the solution is the same—evict and get rid of them efficiently by a device that prevents them from challenging the reason for the action. *Holt* stands in the way of this practice; *Thorpe*, unless reversed, supports it and nullifies *Holt*.

From this, the importance is seen of the application to public housing authorities of the requirement, long recognized as an integral part of procedural due process, that notice must be given to an individual adversely affected by administrative action that is sufficiently specific to apprise the individual of the nature and grounds of the action against him.[19] The general principle is well established that reasons for adverse action by government must be disclosed even if a "benefit" or "privilege" is involved. Thus, for example, in *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, this Court held that an applicant for admission to the New York State Bar had to be told the reasons for his exclusion.[20]

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[19] See *Morgan* v. *United States*, 304 U.S. 1, 18, 19; *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 105-106; *Dixon* v. *Alabama State Bd. of Education*, 294 F.2d 150, 157 (5th Cir. 1961).

[20] Other cases which have required procedural due process as a prerequisite to denial or termination of "privileges" include:

Notice in modern administrative law is not a formalistic requirement. Formal pleadings setting forth reasons for action are, of course, unnecessary. Yet the Constitution requires that the functional purposes of notice be served—that a person affected adversely by government "adjudicatory" action be made aware of the issues in the case at some sufficiently early point in the proceedings to prepare a case. See, 1 Davis, *Administrative Law Treatise*, Section 8.05; Gellhorn and Byse, *Administrative Law, Cases and Comments*, 840-41 (1960).

Petitioner has yet to be informed of the basis for termination of her lease.[21] Without this information she is func-

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Gonzales v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964) (debarment from government contracts); *Dixon* v. *Alabama State Bd. of Education*, 294 F.2d 150 (5th Cir. 1961), *cert. denied* 368 U.S. 930 (expulsion from state university); *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964) (denial of liquor license).

[21] Mrs. Thorpe at no time waived her constitutional right to be apprised of the reasons for the termination of her lease. The waiver of an important constitutional right cannot be lightly implied. *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961); cf. *Johnson* v. *Zerbst*, 304 U.S. 458. Mrs. Thorpe's lease contained no waiver of the right to notice of the reasons for termination. It should not be presumed, from a document that is silent on the subject, that the constitutional rights of indigent public housing tenants have been waived. Leases are prepared by government agencies who stand in an infinitely superior "bargaining position." Indeed, by definition, indigent public housing tenants have no bargaining position at all. They are offered public housing only because they have insufficient funds to obtain decent housing on the private market. Low-income public housing tenants cannot realistically be treated as if they bargain with the government over the terms of their leases.

Indeed, we submit that—far from supporting a finding of waiver—ordinary principles of interpretation support a holding that this lease does require that a ground for eviction be stated in writing. The lease states that it "shall be automatically renewed for successive terms of one month each" at a rental of $29, provided, "there is no change in the income or composition of the family of the tenant and no violation of the terms hereof" (A. 12).

tionally incapable of asserting her rights. Accordingly, she may not, consistently with due process, be evicted by the Authority.

C. A Public Housing Tenant may not be Evicted without being Afforded a Fair Opportunity to Contest the Legal and Factual Adequacy of the Housing Authority's Decision to Terminate the Lease.

Mrs. Thorpe was not only denied adequate notice, but also the fair hearing required by the Constitution. Due process requires that petitioner be given some opportunity to be heard to offer proof to contest the Authority's action cancelling her low-income housing benefits. The right to a hearing has long been regarded as one of the fundamental rudiments of fair procedure necessary where the government acts against a citizen's vital interests.[22] Hearings are an important protection against arbitrariness. They are customary in our law where the decision about how government will treat the citizen turns on issues of fact. The expectable ordinary controversies that may

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The lease has four provisions for termination by management, each premised on a different ground: one allows termination on 30 days' notice; another requires only 15 days' notice; another provides termination "automatically at the option of the management," without notice; and, another requires the tenant to vacate "promptly." Unless the lease requires written notice of the reason for eviction, the tenant cannot know how much notice he is entitled to receive. The lease clearly does not contemplate, for example, that a tenant be evicted on no notice, or on only fifteen days' notice, if the manager's reason is that the tenant's income makes him ineligible. And, similarly, it does not contemplate eviction on fifteen days' notice, or at all, if the manager believes that the tenant's income makes him ineligible when the actual facts are otherwise. Thus, the lease may be, and should be, read to require that the management state a reason for a purported termination of the lease.

[22] See, *e.g.*, *Londoner* v. *Denver*, 210 U.S. 373; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33; *Southern R. Co.* v. *Virginia*, 290 U.S. 190; *Morgan* v. *United States*, 304 U.S. 1.

lead to public housing evictions need fair procedures for fact finding. They might involve various claims of misbehavior by tenants affecting other tenants or the property. Tenants should have the right to have decisions on such issues based on evidence and not on rumor or fancy. For the indigent, eviction is a serious penalty. And, of course, hearings are all the more necessary where First Amendment claims are implicated, or there is a claim of race discrimination, or any similar constitutional claim. This Court and lower federal courts have consistently held that no matter how certain interests are categorized,[33] a hearing is necessary to determine whether they may be terminated by the government. Thus, a hearing is necessary before an individual may be denied admittance to the State Bar (*Willner* v. *Committee on Character and Fitness,* 373 U.S. 96); before a person may be denied the privilege of practicing before the Board of Tax Appeals (*Goldsmith* v. *United States Board of Tax Appeals,* 270 U.S. 117); before security clearance may be revoked (*Greene* v. *McElroy,* 360 U.S. 474); before a State College professor may be dismissed for invoking the privilege against self-incrimination (*Slochower* v. *Board of Higher Education,* 350 U.S. 551); before individuals may be debarred from receiving government contracts (*Gonzales* v. *Freeman,* 334 F.2d 570 (D.C. Cir. 1964)); before a student may be expelled from a state university (*Dixon* v. *Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961), *cert. denied* 368 U.S. 930); and before a liquor license may be denied (*Hornsby* v. *Allen,* 326 F.2d 605 (5th Cir. 1964)).

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[33] The verbal distinction between "rights" and "privileges" may not be allowed to impose unconstitutional conditions upon the receipt of "benefits" or "privileges." See, *e.g., Sherbert* v. *Verner,* 374 U.S. 398; *Speiser* v. *Randall,* 357 U.S. 513; *Shelton* v. *Tucker,* 364 U.S. 479; *Wiemann* v. *Updegraff,* 344 U.S. 183; *Keyishian* v. *Board of Regents of the University of the State of New York,* 385 U.S. 589.

When the poor deal with government welfare agencies they should receive no less protection than is accorded to lawyers, businessmen, and college students in their confrontations with government. As Professor Harry Jones has put it, this is "the task of the rule of law." [24] Addressing the issue, Professor Charles A. Reich has written, concerning public welfare programs generally:

> In a society where a significant portion of the population is dependent on social welfare, decisions about eligibility for benefits are among the most important that a government can make. By one set of values the granting of a license to broadcast over a television channel, or to build a hydroelectric project on a river, might seem of more far-reaching significance. But in a society that considers the individual as its basic unit, a decision affecting the life of a person or a family should not be taken by means that would be unfair for a television station or power company. Indeed, full adjudicatory procedures are far more appropriate in welfare cases than in most of the areas of administrative procedure.
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> At a minimum, there should be notice to beneficiaries of regulations and proposed adverse action, and fact finding should be carried on in a scrupulous fashion.
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[24] Jones, *The Rule of Law and the Welfare State*, 58 Colum. L. Rev. 143, 156 (1958):

> In the welfare state, the private citizen is forever encountering public officials of many kinds: regulators, dispensers of social services, managers of state-operated enterprises. It is the task of the rule of law to see to it that these multiplied and diverse encounters are as fair, as just, and as free from arbitrariness as are the familiar encounters of the right-asserting private citizen with the judicial officers of the traditional law.

> Procedures can develop gradually and pragmatically, but as welfare grows in importance in our society, it will be necessary to give increasing attention to the procedures by which welfare rights are granted or refused. Here the experience of lawyers can be of great assistance; whatever the outcome of particular decisions, adequate procedure gives a sense of fairness that is vital to community acceptance of a welfare program.[25]

In his concurring opinion in *Joint Anti-Fascist Refugee Com.* v. *McGrath,* 341 U.S. 123, Mr. Justice Frankfurter stated what he thought were the proper considerations in determining whether there is a right to a hearing:

> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedures that were followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment. 341 U.S. at 163.

Appraising the circumstances of Mrs. Thorpe's case against the tests mentioned by Mr. Justice Frankfurter persuasively demonstrates her right to a hearing as a matter of fundamental fairness:

1. *"The precise nature of the interest that has been adversely affected."* Petitioner's interest involves the difference between living in a low-cost, decent, sanitary and stable environment, and being relegated to slums that "may

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[25] Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues,* 74 Yale L.J. 1245, 1253 (1965).

indeed make living an almost insufferable burden." *Berman v. Parker*, 348 U.S. 26, 32. In Mrs. Thorpe's case, the slum may well be a racial ghetto with the kind of dilapidated, overcrowded housing that the National Advisory Commission identified as one of the most significant grievances leading to the recent riots and disorder.[26]

2. "*[T]he manner in which this was done, the reason for doing it.*" The eviction notice stated no reason for the action, and no reason was otherwise disclosed despite petitioner's repeated requests. This is sufficient commentary on the arbitrary manner in which she was treated.

3. "*[T]he available alternatives to the procedure that was followed.*" The Housing Authority could have afforded Mrs. Thorpe a written statement of the grounds for cancelling her lease, and an opportunity to present her version of any contested issues of fact affecting her right to remain in the housing project. Great formality of procedures in the conduct of a hearing would not appear to be necessary so long as the procedures employed give Mrs. Thorpe a fair chance to know and meet the issues, to make her own position known, and to document or support that position factually. But, if more formal hearing procedures were needed, the Housing Authority of the City of Durham has statutory power "to conduct examinations and investigations and to hear testimony and take proof under oath at public or private hearings on any matter material for its information." Gen. Stats. of N.C., §157-9. The Authority can "issue subpoenas requiring the attendance of witnesses or the production of books and papers and . . . issue commissions for the examination of witnesses who are out of the State or unable to attend before

[26] *Report of the National Advisory Commission on Civil Disorders*, p. 472-3 (Bantam ed. 1968).

the authority, or excused from attendance" *Ibid.* The Authority is empowered to delegate its powers to conduct investigations or examinations, and to administer oaths and issue subpoenas, to committees, to counsel and to officers or employees. *Ibid.* (App. II, *infra,* pp. 15a-16a). The Authority has made no effort to show that a hearing to resolve factual disputes determinative of a tenant's right to remain in a project would be burdensome or impractical. Surely some traditional safeguards are needed lest tenants be deprived of their low-income housing benefits on the basis of vicious and unfounded rumors about their personal lives or for any of a variety of invidious reasons. Petitioner's First Amendment claim should have been decided only under procedural safeguards to insure fair and reliable fact-finding.[27]

4. "[*T*]*he protection implicit in the office of the functionary whose conduct is challenged.*" Housing authority

[27] Recently, public housing authorities have established procedures for eviction, evidently in response to the 1967 HUD circular. Thus, the St. Louis Housing Authority has set out specific reasons that may be the bases for evictions, including failure to pay rent, failure to report changes in income and family size, vandalism, poor housekeeping, narcotic traffic, disturbing neighbors, etc. Tenants are told of the specific complaint and are given the opportunity to answer charges. The Cleveland Metropolitan Housing Authority has proposed an arbitration procedure with a three-man panel composed of one person picked by the Authority, one by the tenant or tenant union representation, and one person agreed upon by both parties from an independent panel. The arbitration is to be conducted pursuant to rules promulgated by the American Arbitration Association, its decision is to be in writing, and will be binding on all parties.

For a full discussion of the issues, procedural and substantive, relating to rights of tenants in public housing, see, Rosen, *Tenants' Rights in Public Housing,* in "Housing for the Poor: Rights and Remedies," Project on Social Welfare Law, Supp. No. 1, N.Y.U. School of Law, New York, N.Y. (1967). See also, Note, *Public Landlords and Private Tenants: The Eviction of "Undesirables" From Public Housing Projects,* 77 Yale L.J. 988 (1968).

managers and supervisory officials ordinarily have no training in or special sensitivity to problems of constitutional law, are not directly responsive to an electorate, and are unlikely to be morally or intellectually superior to any other class of government administrators. They have no special distinction which makes them the safe repositories of arbitrary power.

5. "*[T]he balance of hurt complained of and good accomplished.*" The injury threatened to Mrs. Thorpe has been discussed above. The Housing Authority's secrecy about its reasons for evicting her deprives the Court of any opportunity to appraise what good, if any, might be accomplished by evicting her. Denial of a hearing may plainly hide evil, but we are unable to perceive any useful public purpose that it might accomplish.

Thus, Mrs. Thorpe's right to her apartment should not be taken away without giving her a fair chance to be heard.[28] And the hearing must be more than an empty

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[28] *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, does not indicate a contrary result. There, the Court said that the requirements of due process depend on a "determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." 367 U.S. at 895. This test may not be different from the standards enunciated by Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Com., supra*. In any event, the governmental function involved in *Cafeteria Workers* was operating a Navy base; the Navy Regulations conferred an almost absolute power on the commanding officer to govern the base; the reason advanced for excluding the petitioner there—failure to meet security requirements—was, in the Court's opinion, "entirely rational" (367 U.S. at 898); and the petitioner had the alternative of accepting similar employment elsewhere. In contrast, the governmental function here is the provision of necessary housing benefits to petitioner and poor persons in her class; the government functionary —the project manager—has no statutory or regulatory authority to act as a commanding officer; *no* reason, rational or otherwise, was advanced for excluding petitioner; and petitioner's alternative to her present apartment is the slum.

formality. It is necessary that the individual be given a realistic opportunity to confront and come to grips with the reasons for adverse action by the government. In *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, the petitioner had unsuccessfully sought admittance to the New York State Bar periodically for over 25 years. At several points, his case was reviewed by New York courts. However, at no point did these adjudicatory proceedings offer him the opportunity to confront and contradict the reasons for his exclusion. This Court found that despite the many proceedings in New York, the petitioner had never had an adequate hearing.

> It does not appear from the record that either the Committee or the Appellate Division, at any stage in these proceedings, ever apprised petitioner of its reasons for failing to be convinced of his good character. Petitioner was clearly entitled to notice of and a *hearing on the grounds for his rejection* either before the Committee or before the Appellate Division. *Willner* v. *Committee on Character and Fitness*, 373 U.S. at 105. (emphasis added.)

That the concept of a fair hearing includes, at the least, the right to subject the rationale of agency action to scrutiny was recognized before *Willner*. The Court of Appeals for the District of Columbia stated in *Jordan* v. *American Eagle Fire Insurance Co.*, 169 F.2d 281 (D.C. Cir. 1948):

> It is clear that the hearing afforded by the Superintendent was not valid as a quasi-judicial hearing. . . . Neither the bases nor the processes of the Superintendent's order were explored, because they were not revealed except in the most summary fashion. 169 F.2d at 287.

In sum, due process requires some procedure that minimally provides certain safeguards for the adjudication of the basis for the governmental action challenged. The form and forum of the proceeding may vary. The hearing may take place before the agency or in court. See *Jordan* v. *American Eagle Fire Insurance Co., supra.* But whatever the nature of the proceeding, it must at least provide opportunity to know and to meet the evidence and the argument on the other side before the governmental action becomes effective. This includes the opportunity to present evidence and arguments (*Londoner* v. *Denver*, 210 U.S. 373), to confront opposing witnesses (*Willner* v. *Committee on Character and Fitness*, 373 U.S. 96), and effectively to present the tenant's own version of the facts, with the decision to be based on the facts presented.[29]

D. The Proceedings Below Did Not and Could Not Provide the Type of Hearing Required by Constitutional Due Process.

Prior to the appearance of this case in this Court, the respondent Housing Authority asserted the position that it need not have a reason for its action, since, under the terms of the lease, its reason, if any, was immaterial. It was successful in the state courts in maintaining that posture; the case was tried and the eviction order affirmed on that basis. Only here did the authority suddenly shift ground. It now argues that, in spite of its posture below and the clear holdings of the North Carolina courts, peti-

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[29] Cf. *Specht* v. *Patterson*, 386 U.S. 605, where the Court said that in a sentencing procedure

> Due process . . . requires that [the person affected] . ... have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence on his own. And there must be findings adequate to make meaningful any appeal that is allowed. 386 U.S. at 610.

tioner could have found out the reasons and could have received an adequate hearing on those reasons.

Petitioner urges that this position is untenable. In this case, Mrs. Thorpe did not in fact ever receive a hearing on the precise issue involved or the reasons, if any, for the Housing Authority's action and the evidence, if any, to support its reasons. It was stipulated by the parties and found as fact by the Superior Court that the reasons for termination were not given and that no administrative hearing was afforded (A. 22). Moreover, given the legal basis on which the proceedings below were conducted, she never *could* have learned the reasons or received a hearing on them.

The only proceedings which might appear to constitute a "hearing" were the summary eviction proceedings instituted before the Justice of the Peace, and the trial *de novo* in the Superior Court. Certainly, proceedings in open court, held before the governmental action in issue became effective, might satisfy the requirements of due process. However, it is essential that court proceedings, like administrative hearings, address themselves to the precise action of government which is being challenged.

Although there is no record of the justice of the peace proceeding, it is apparent that the case was tried under provisions of the state summary ejectment statutes, Gen. Stats. of North Carolina, §42-26 et seq. (App. III, *infra*, pp. 21a-25a). Since the basis for eviction was the termination of the lease after the expiration of petitioner's term, the action was brought under §42-26(1) (rather than under §42-26(2), which requires the landlord to prove a violation of a lease provision; i.e., to give a reason for the eviction.) (App. III, *infra*, p. 21a). Thus, the only issue to be tried was whether petitioner, as a tenant, was holding over

after her term had expired. It was stipulated that the director of the Authority testified in the justice court that petitioner was not evicted because of her organizing activities. However, he did not testify as to what was, in fact, the reason, if any (A. 13-14).[10]

At the trial in the Superior Court petitioner was in no better position to litigate her constitutional claims. That the Superior Court judge tried and decided the case solely on the consideration of the single, narrow issue of whether petitioner was holding over past the term of her lease is clear from his conclusions of law, where he stated that: (1) petitioner occupied the premises pursuant to a lease that gave her a month-to-month tenancy; (2) by giving notice of termination at least 15 days before the end of the term, the lease was terminated as of August 31; (3) Mrs. Thorpe's continued tenancy was without right; (4) *the Authority owed no duty to give petitioner any reason for terminating the lease or to give a hearing;* and (5) the Authority had acted in conformity with the lease and laws of the state. (A. 22-23).

The North Carolina Supreme Court found "no error" in the judgment of the Superior Court, and in its first decision, stated:

> It is immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease. (A. 28).

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[10] There is no suggestion that the Authority had any reason which it was prepared to divulge and rely on. It does not appear from the record whether the director did not testify as to the reason because he was not asked, or because when he was asked an objection was made and sustained on the ground that the reason was irrelevant because the only issue in the case was whether Mrs. Thorpe was holding over past her term.

By holding both that the failure to communicate a reason for termination constituted no error and that the reason for failure to renew was irrelevant, the courts of North Carolina failed to allow a hearing *on the issue of the reasons for termination.* Neither the legal sufficiency of the reasons nor any evidentiary support for the reasons could be brought before the courts, since it was held that the reasons were irrelevant and need not be disclosed.

The North Carolina Supreme Court shifted ground somewhat in its decision on remand from this Court. In its latest opinion there is no indication that, if the reason for eviction was petitioner's organizing activities, then that reason would be immaterial. Instead, the Court admitted that the timing of the tenants club election and the serving of the notice to vacate "may arouse suspicion." (A. 40). However, suspicion was not enough, it held, in the face of the Authority manager's denial and since "no evidence was offered as to the purposes of the club or that its activities conflicted with the interests of the Authority." (A. 42).

On remand, therefore, the court below treated this case differently than it had treated it before and, more importantly, differently than it had been treated by the trial court. The Supreme Court spoke as if petitioner could have fully litigated her free speech claim.[21] Clearly, the Superior Court (and the Supreme Court on the first appeal) had not tried or decided the case on that assumption. Because of the Court's apparent new view that the reason for eviction had become relevant, it should have, instead of reaffirming, remanded the case to the trial court to require the Authority to come forward with a reason

[21] It must be noted, however, that the court below did *not* hold that the Housing Authority must have a valid reason for the eviction. It only said that an improper reason had not been affirmatively shown by petitioner.

for its action and to give petitioner an opportunity to present her evidence and to have the cause tried on the true issues.

It is clearly insufficient to force the tenant to speculate as to the Housing Authority's reasons and to make a finding of fact based only on the *denial* that the reason was the alleged one. Due process requires a full inquiry into the real reasons. The court could not make a fair determination of whether Mrs. Thorpe's participation in the tenant's group was the reason for termination without some inquiry into what, in fact, the reasons were. An illustration of the vice inherent in the procedures followed below is *Holt* v. *Richmond Redevelopment and Housing Authority*, 266 F.Supp. 397 (E.D. Va., 1966). There, it was only by detailed inquiry into the agency's stated reason for termination that the court was able to find that the real reason for termination was an unconstitutional reprisal as alleged by the tenant. A simple allegation and subsequent denial of the reason could not have afforded an adequate basis for the finding made by the court. Thus, in the instant case, to hold that the Authority cannot evict for an impermissible reason is to create an unenforceable, meaningless rule, unless the Authority must disclose its reasons and unless the reasons are subject to fair examination.

Deeming the reasons for termination immaterial to this case, the North Carolina courts essentially precluded any means of determining what those reasons were and of obtaining a fair opportunity to explore their legal and factual basis. Under North Carolina practice, discovery is not available with respect to issues which are immaterial to the cause of action. See, *e.g. Flanner* v. *St. Joseph Home for the Blind Sisters of St. Joseph of Newark*, 227

N.C. 342, 42 S.E.2d 225 (1947); *H.L. Coble Construction Co.* v. *Housing Authority of the City of Durham,* 244 N.C. 261, 93 S.E.2d 98 (1956).

Even if the reasons for termination could have been obtained through discovery, the North Carolina courts would have precluded petitioner from obtaining a hearing on the legal and factual basis for the reasons. Since the reasons were held legally immaterial, any affirmative evidence introduced by petitioner to challenge the basis for such reasons would, of course, not be admissible. Under North Carolina law, as in most States, the test of admissibility is the relevance and materiality of the evidence with relation to the specific issues being tried. See, *e.g., Gurganus* v. *Guaranty Bank & Trust Co.,* 246 N.C. 655, 100 S.E.2d 81 (1957); *Culbertson* v. *Rogers,* 242 N.C. 622, 89 S.E.2d 299 (1955).

Similarly, the Housing Authority officials could not have been cross-examined as to the basis for their reasons. While North Carolina has a broad scope of permissible cross examination, the examination must minimally relate to "matter relevant to the inquiry." See, *e.g., Smith* v. *Railroad,* 147 N.C. 603 (1908); *State* v. *Huskins,* 209 N.C. 727, 184 S.E. 480 (1936). See also, McCormick, *Evidence,* 43 (1954). Again, however, the North Carolina courts held, as a matter of law, that the reasons were irrelevant to the inquiry. If cross-examination is limited to matters relevant to the inquiry, and the reasons are "immaterial," then such an avenue is, of course, precluded as a means of finding out, in the first instance, the reasons for termination.

Perhaps more importantly, there are, as has been pointed out above, unsurmountable practical obstacles to conducting an effective cross-examination given the testi-

mony of the director and the attitude of the court. How does one cross-examine a witness who says, in effect, "we had no reason—we just evicted Mrs. Thorpe. Her tenant organizing activities were not the reason, if we had any." In the face of being unable to show that an asserted reason is baseless, how would one go about demonstrating that the real reason is a constitutionally impermissible one?

Finally, even if the reasons could have been elicited by cross-examination, discovery of the reasons at that time—in the middle of the trial itself—would not have afforded constitutionally adequate notice of the nature of the charges against the tenant. The only fair procedure is to give the tenant *prior* notice, thus affording him an opportunity to investigate, contact witnesses and properly prepare his case. Petitioner urges that disclosure for the first time in court would not cure the failure to give a reason at the time her benefits were cancelled. Cf., *In re Ruffalo*, —— U.S. ——, 20 L.Ed. 2d 117.

An important ground for requiring that the Authority state a reason is to insure that the Authority will actually formulate a reason and act responsibly in cutting off governmental benefits. This objective is not accomplished by disclosure of a reason for the first time in court, when the reason may be merely a *post facto* attempt to justify that which was done for no good reason. Public housing officials deal with tenants who are impoverished, and are often ignorant of their rights. The tenants will not often know whether to resist an order to move unless they know the grounds of the agency's action. They will rarely have lawyers or the resources to go to court to find out why they are being evicted. They should at least be told why they are being subjected to eviction—a punishment that

is real and severe. It is unfair to put the burden on the tenant to allege and prove—blindly—that he is being evicted for an impermissible reason, when the local authority has no legitimate interest in keeping its reasons secret and the tenant must have sufficient notice in order to prepare a proper case.

The corollary of this is that the only way to assure a reasoned judgment to evict in the first instance is to make the Authority think about its reasons before it evicts. Thus, in many instances the problems that an indigent tenant faces will be avoided. Public housing tenants are not in the position of Consolidated Edison faced with a ruling by the Federal Power Commission or of a television company that disagrees with the Federal Communications Commission. Tenants simply do not have the power of resistance and the resources to hold or force a public housing authority to a reasoned re-judgment by getting its first decision set aside judicially.

In summary, Petitioner asks that she be afforded the basic protections of due process before she and her children are relegated to a slum; so far, she has not received them. In a recent case, raising the same claim in a case involving a non-federally supported housing authority, the Second Department of the Appellate Division of the Supreme Court of New York held:

> [O]ur state has distinguished low rent housing as a human need to be satisfied through government action and has created by specific statutory provisions the structure of the relationship between the housing authority and the tenant . . . We think that a housing authority cannot arbitrarily deprive a tenant of his right to continue occupancy through the exercise of a contractual provision to terminate the lease. In

other words, the action of the housing authority must not rest on mere whim or caprice or an arbitrary reason. (*In the matter of Vinson* v. *Greenburgh Housing Authority* (March 11, 1968): reproduced in App. VI, *infra*, pp. 45a-59a).

To date, Respondent has not shown that it is not acting other than at its "mere whim or caprice." At best, its reason is arbitrary; at worst, it is to deny First Amendment rights. Mrs. Thorpe seeks to vindicate the right of herself and hundreds of thousands of others to be free of such actions.

II.

The February 7, 1967, Circular of the Department of Housing and Urban Development Requires That the Judgment Below Be Reversed and That Petitioner Be Told the Reasons for Termination of Her Lease and Be Given an Opportunity to Be Heard Before She Is Evicted.

On February 7, 1967, while this case was pending before this Court on the prior appeal, the United States Department of Housing and Urban Development, acting through the Housing Assistance Administration, issued a circular to all federally assisted public housing authorities requiring that:

> [N]o tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish. (App. IV, *infra*, p. 26a.)

This Court remanded the case to the North Carolina Supreme Court for reconsideration in light of the circular and expressly declined to reach the constitutional claims involved. The lower court, on remand, held that the circular was issued too late to have any application to this case, despite the fact that the eviction order had not yet become final and the terms of the circular had not been complied with.

We have contended in part I of this brief, *supra*, at p. 18, that the circular, even if applied in this case, cannot satisfy the constitutional claims urged by petitioner in the absence of a construction of it by this Court in light of the requirements of due process. Below, the reasons for this contention will be more fully developed. Initially, however, we will discuss the mandatory nature of the circular, the authority of HUD to issue it, and why it should apply in the present case.

A. The Circular Is a Mandatory Regulation.

When this case was here before, this Court expressly declined to decide either "[t]he legal effect of the circular" or "the extent to which it binds local housing authorities." [32]

The mandatory and binding nature of the circular is not open to serious doubt. It is clear that the HUD circular is intended to be a binding regulation, compulsory for low-rent, federally-assisted projects. The circular's mandatory language may be contrasted with the provision of the superseded circular of May 31, 1966, which stated only that federal authorities:

> . . . *strongly urge, as a matter of good social policy,* that Local Authorities in a private conference inform any tenants who are given [eviction] notices of the

[32] 386 U.S. 670, 673, note 4.

reasons for this action (App. IV, *infra*, p. 28a) (emphasis added).

The February 7 directive also provides that each authority "*shall* maintain" records giving the detailed reasons for every eviction (App. IV, *infra*, p. 27a). Moreover, the Low-Rent Housing Management Manual, which contains binding statements of HUD policy, itself speaks to the status of circulars. It states:

> Circulars of a procedural nature contain requirements which have the same effect as manuals; they are temporary additions to or modifications of the manuals pending incorporation of the provisions into the appropriate manual, and are clearly identified as such.[33]

The binding nature of the circular was confirmed by its incorporation, in October 1967, in the HUD Management Manual. (App. IV, *infra*, p. 35a) HUD manuals are binding, containing "requirements which supplement the provisions of the Contracts between the Local Authority and the PHA."[34]

Any doubt as to the mandatory nature of the circular has been dispelled by a letter of Mr. Don Hummel, Assistant Secretary of Housing and Urban Development for the Housing Assistance Administration. Mr. Hummel states:

> It is our position that the circular is legally authorized under Section 8 of the United States Housing Act of 1937; that it means what it says; and that we

[33] See Low Rent Housing Management Manual, Section 100.2(2)(b) (App. IV, *infra*, p. 32a).

[34] All PHA "manuals" (as distinguished from "handbooks") contain binding requirements. See Low Rent Housing Management Manual, Section 100.2(2)(a) (App. IV, *infra*, p. 31a).

> intended it to be followed. . . . The circular is as binding in its present form as it will be after incorporation in the manual. It is in the process of being so incorporated. (App. V, *infra*, pp. 39a-40a).[35]

Since the circular, then, is mandatory, it remains to consider the authority of HUD to issue it and its applicability to this case.

B. HUD Had Authority to Issue the Circular.

While the circular itself does not specify the authority under which it is authorized, this Court suggested previously that the necessary authorization is found in Section 8 of the Housing Act of 1937, 42 U.S.C. § 1408.[36] This is also the position of Mr. Hummel.[37] That statute grants HUD[38] power to make "such rules and regulations as may be necessary to carry out" the federal programs for assistance to low-rent housing projects (App. I. *infra*, p. 3a). Similar authority is conferred by 42 U.S.C. § 1404(a), which gives the administrator authority to "make such rules and regulations as he may find necessary to carry out his functions, powers and duties." (App. I, *infra*, p. 2a.) The authority of HUD to require the keeping of the

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[35] The letter of Mr. Hummel, the official over whose signature the circular issued, was in response to a letter from one of petitioner's attorneys requesting the opinion of the Department on questions relating to the meaning and intent of the circular. The full texts of the letter of inquiry and the response thereto are set out in App. V, *infra*, pp. 36a-44a.

[36] 386 U.S. 670, 673, note 4.

[37] See text at note 35, *supra*.

[38] The Housing Act refers to the Public Housing Administration. The powers and functions of that agency were transferred to the Department of Housing and Urban Development by Sec. 5(a) of the Department of Housing and Urban Development Act, 79 Stat. 667 (Sept. 9, 1965).

records mentioned in the February 7 circular is also conferred by 42 U.S.C. § 1434. (App. I, *infra*, p. 7a.)

The statutory grant of power is not unlike similar rule-making powers conferred on most large and important federal administrative agencies.[39] Thus, the scope of the power conferred should be read according to the familiar principle of administrative law that rules and regulations will be upheld and enforced so long as they are not inconsistent with specific provisions or the general purpose of the statute or the Constitution.[40] Here, the circular is certainly not inconsistent with the statute and we urge that its requirements are indeed compelled by the Constitution.[41]

C. The Circular's Requirements Govern This Case.

Petitioner submits that since the circular was issued while the present lawsuit was pending on direct review, it should be applied in this action. The Housing Authority has not complied with its terms. It should be re-emphasized that petitioner is still occupying her apartment under a

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[39] See, *e.g.*, 42 U.S.C. §1302 (Department of Health, Education, and Welfare); 47 U.S.C. §11 (Federal Communications Commission); 49 U.S.C. §1324(a) (Civil Aeronautics Board). The legislative history of the instant provision states simply:

> This section empowers the Authority to draw up and put into effect rules and regulations. . . .

Senate Comm. on Labor and Education, S. Rep. No. 933, 75th Cong., 1st Sess., 15 (1937).

[40] See, *e.g.*, *Yakus* v. *United States*, 321 U.S. 414; *N.B.C.* v. *United States*, 319 U.S. 190; *Lichter* v. *United tates*, 334 U.S. 742. In general, the scope of delegation of rule-making powers in the cases is far broader than that involved here. The requisite standards for the rule-making in this case are amply supplied by the Housing Act. Certainly, it is in keeping with the purpose of the Act to provide additional security to tenants.

[41] See part I of this brief.

stay issued by the North Carolina Supreme Court, and that she has still not been told the reasons for her eviction. Thus, there is no reason why the procedures required by the circular should not apply here.

Petitioner urges that this newly adopted procedural rule should be applied to her case in accordance with the generally applicable principle that procedural changes of law will be applied to pending litigation so that the case is decided on the basis of the law as it exists at the time the Court is called upon to decide it. See *Bruner* v. *United States*, 343 U.S. 112 (suit by employee against United States; pending certiorari in Supreme Court on question of jurisdiction of district court, Congress amended statute making it clear that there was no such jurisdiction; the new statutory rule was applied to the pending case); *Ex parte Collett*, 337 U.S. 55 (new code provision applying *forum non conveniens* to FELA cases applied to pending case); *Orr* v. *United States*, 174 F.2d 577 (2nd Cir. 1949) (change in venue provisions applied in pending case); *In re Moneys Deposited, etc.*, 243 F.2d 443 (3rd Cir. 1957) (procedural change in bankruptcy law applied in pending case on appeal); *Frye* v. *Celebrezze*, 365 F.2d 865, 867 (4th Cir. 1966) ("No good reason appears why the 1965 amendment [of the claim filing provision of the Social Security Act] should not be applied to a pending case for judicial review of an administrative determination."); *Schoen* v. *Mountain Producers Corporation*, 170 F.2d 707 (3rd Cir. 1948) (change in rule of *forum non conveniens* applied in pending case); *Bowles* v. *Strickland*, 151 F.2d 419 (5th Cir. 1945) (procedural rule change relating to filing of suit under Emergency Price Control Act applied in pending case); *Hoadley* v. *San Francisco*, 94 U.S. 4 (change in removal statute applicable to case pending in state court); and *Congress of Racial Equality*

v. *Clinton*, 346 F.2d 911 (5th Cir. 1964), and *Rachel* v. *Georgia*, 342 F.2d 336 (5th Cir. 1965) *aff'd*, 384 U.S. 780 (change in statute to allow appeal of remand order in civil rights removal case applied to pending cases).

Of course, *Hamm* v. *Rock Hill*, 379 U.S. 306, illustrates the application of the rule applying a new statute to decide substantive rights in a pending case. See also *United States* v. *Chambers*, 291 U.S. 217; *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538; *Ziffrin, Inc.* v. *United States*, 318 U.S. 73; *Slaughter* v. *Elkins*, 260 F. Supp. 835 (W.D. Va. 1966). As Chief Justice Marshall stated in *United States* v. *Schooner Peggy*, 1 Cranch. 103, 110 (1801):

> But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs. the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation.

The effectuation of the purpose of the new and more enlightened policy, as perceived by the Court, was strongly influential in these cases. Similarly, in deciding whether or not to apply new judicial decisions to pending cases—or even retrospectively to cases which have become final—the Court has looked to the purpose of the rule involved.[42]

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[42] See, for example, *Linkletter* v. *Walker*, 381 U.S. 618, holding that the rule of *Mapp* v. *Ohio*, 367 U.S. 643, would be applied only prospectively because the purpose of the rule was to deter unlawful conduct, and this purpose would not be served by retrospective application of exclusionary rule. Of course, the *Mapp* decision was applied to cases pending on appeal at the time of *Mapp*. *Johnson* v. *New Jersey*, 384 U.S. 719. See also *O'Connor* v. *Ohio*, 385 U.S. 92, which applies the Fifth Amendment principle of

The North Carolina Supreme Court, in holding the circular inapplicable to this case, relied on *Greene* v. *United States*, 376 U.S. 149. This reliance was misplaced. In *Greene*, this Court refused to hold that a new regulation promulgated after a "final judicial order" that decided the case on the merits barred the petitioner from enforcing his substantive rights which had matured under the Court's decision in *Greene* v. *McElroy*, 360 U.S. 474. But in the instant case, the Housing Authority has no matured rights under any final judgment, for the judgment is still on direct review.

Moreover, application of the new HUD rule in this case is justified by the language of the circular and its purpose. As this Court noted, there is no suggestion from its language that its procedures are not to be followed in all non-final eviction proceedings. 386 U.S. at 673. The first paragraph of the circular, which refers to the dissatisfaction caused by prior practices and the litigation filed throughout the United States challenging those practices, reflects the concern for rendering justice to the individuals who have focused attention on the practice and stimulated reform. The second paragraph, prescribing an essential requirement that a tenant be told the reasons for the eviction and "given an opportunity to make such reply or explanation as he may wish" is timeless, as written. The paragraph contains no language of futurity. In contrast, the third paragraph, establishing a record-keeping requirement, does expressly refer to the future and applies "from this date," *i.e.*, February 7, 1967. The final paragraph, which says that the earlier circular

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Griffin v. *California*, 380 U.S. 609, to a pending case. And see the decisions giving retrospective effect to the right to counsel as declared in *Gideon* v. *Wainwright*, 372 U.S. 335, *e.g.*, *Doughty* v. *Maxwell*, 376 U.S. 202; *United States* v. *LaVallee*, 330 F.2d 303 (2nd Cir. 1964).

strongly urging that tenants be told reasons for eviction is superseded, is consistent with applicability to pending unsettled disputes.

Finally, this case involves a procedural regulation in the classic sense—it relates to notice and the right to be heard. The new rule requires procedural safeguards prior to a notice to vacate and the initiation of an action to evict, but does not deprive the local housing authority of its right to maintain eviction proceedings after compliance with the prescribed procedures. Compliance with the requirement would not be duplicative or wasteful in the instant case, for petitioner has not yet been ousted from her apartment and the Authority has never given her the benefit of the required procedures.

D. Construction of the Circular.

Petitioner urges that the HUD circular must be construed in light of the requirements of due process, if it is to satisfy her constitutional claims. Again, those claims are that she is entitled to notice of the reasons why she is being evicted and a hearing, whether administrative or judicial, at which those reasons can be fully explored.

With regard to the requirement of notice, the circular is clear that tenants must be told why they are being evicted and the factual basis for the reason *before* being served with a notice to vacate. The HUD directive, in requiring that records be kept of evictions, mandates that the records contain:

> Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted. (App. IV, *infra*, p. 27a).

Of course, if notice is adequately to apprise the tenant of the nature of the charge against him, it must contain something more than a vague phrase such as "undesirable actions." The notice required by the circular, then, is a statement of the factual basis for the Authority's action sufficiently specific to enable the tenant to understand and to contest it. Indeed, as we urged in part I of this brief, the constitutional requirement of notice also mandates reasonable specificity. In this case, of course, the circular was not complied with; Mrs. Thorpe has never been told the reason or reasons for her eviction, either before the notice to vacate was served or subsequently.

With regard to the requirement that a tenant be given a hearing that adequately provides for an exploration of the reasons and a decision thereon, the circular is much less specific. It states only that at the "private conference" the tenant be given "an opportunity to make such reply or explanation as he may wish." The circular is not clear as to the nature of the opportunity to reply which must be given. The possibilities range from an informal conference to a full "due process" hearing with the concomitant protections. The only presently available indication of HUD's intent—the letter from the Assistant Secretary for Renewal and Housing Assistance (App. V, *infra*, pp. 39a-43a)—indicates that in its view an informal conference would satisfy the circular. Indeed, the Department takes the position that the question of whether a hearing that complies with due process is required is one of the issues to be decided in this case (*Id.* at 42a). Therefore, petitioner urges this Court to give a broad interpretation to the circular as a matter of policy and in order to assure that it does not raise constitutional difficulties as to the nature of a fair hearing.[43]

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[43] This Court has liberally interpreted statutes and administrative regulations to afford full hearings in order to obviate consti-

of housing need, and source of income: *Provided,* That in establishing such admission policies the public housing agency shall accord to families of low income such priority over single persons as it determines to be necessary to avoid undue hardship; and

(3) the public housing agency shall determine, and so certify to the Administration, that each family in the project was admitted in accordance with duly adopted regulations and approved income limits; and the public housing agency shall make periodic reexaminations of the incomes of families living in the project and shall require any family whose income has increased beyond the approved maximum income limits for continued occupancy to move from the project unless the public housing agency determines that, due to special circumstances, the family is unable to find decent, safe and sanitary housing within its financial reach although making every reasonable effort to do so, in which event such family may be permitted to remain for the duration of such a situation if it pays an increased rent consistent with such family's increased income. Sept. 1, 1937, c. 896, §10, 50 Stat. 891; June 21, 1938, c. 554, Title VI, §601, 52 Stat. 820; 1947 Reorg. Plan No. 3, §§1, 4(a), 9, eff. July 27, 1947, 12 F.R. 498, 61 Stat. 954; July 15, 1949, c. 338, Title III, §§302(a), 304(a), (c), (e), (f), 305, 307(d), 63 Stat. 423-426, 430; Aug. 2, 1954, c. 649, Title IV, §§401 (1), (2), 402, 403, 405, 406, 68 Stat. 630; June 30, 1955, c. 251, §3, 69 Stat. 225; Aug. 11, 1955, c. 783, Title I, §108(b), 69 Stat. 638; Aug. 7, 1956, c. 1029, Title IV, §§401(a), 404(b), 70 Stat. 1103, 1104; As amended Sept. 23, 1959, Pub.L. 86-372, Title V, §§505(a), 507, 73 Stat. 680, 681; June 30, 1961, Pub.L. 87-70, Title II, §§203, 204(a), (b), 205, 206(b), (c), 75 Stat. 163, 164, 165.

Excerpts from the United States Housing Act of 1937

§ 1415. Preservation of low rents

In order to insure that the low-rent character of housing projects will be preserved, and that the other purposes of this chapter will be achieved, it is provided that—

* * * * *

LOCAL RESPONSIBILITIES AND DETERMINATIONS

(7) In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise—

(a) The Administration shall not make any contract with a public housing agency for preliminary loans (all of which shall be repaid out of any moneys which become available to such agency for the development of the projects involved) for surveys and planning in respect to any low-rent housing projects initiated after March 1, 1949, (i) unless the governing body of the locality involved has by resolution approved the application of the public housing agency for such preliminary loan; and (ii) unless the public housing agency has demonstrated to the satisfaction of the Administration that there is a need for such low-rent housing which is not being met by private enterprise; and

(b) The Administration shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Administration pursuant to this chapter; (ii) unless the public housing agency has demon-

The circular should be interpreted to require such procedures as may reasonably be necessary to give a complete and full airing of the controverted facts. These would include the right to be heard in person or by counsel at the hearing or "conference," and also would include a fair opportunity to challenge the grounds of the local authority's proposed action, to be confronted with persons who have made charges against the tenant, to probe the facts replied upon by the authority, and to present the tenant's own version of the facts. The circular should also be interpreted to require that the Authority's decision be rendered on the basis of the facts presented to it.

Finally, this Court should make clear that the procedural rights created by the circular are judicially enforceable in the only forum that is realistically available for their vindication: that is, in defense of an eviction proceeding. Again, the circular itself is not explicit on the point, although any other construction of it would be nullifying. There is no indication on the face of the HUD circular that it changes the nature of the summary eviction proceedings afforded public housing tenants in North Carolina or elsewhere: i.e., proceedings in which the only issue to be tried is whether the tenant is holding over past the term of the lease. The circular does not prohibit the use of month-to-month leases under which the Authority may obtain a judgment of eviction on the sole basis of proper notice of termination and without any allegation or proof of cause.[44] Under the circular, the

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tutional difficulties. Thus, in *Greene* v. *McElroy*, 360 U.S. 474, the Court read the right to confront and cross-examine witnesses into a regulatory scheme which was silent on the subject.

[44] Indeed, HUD's non-mandatory local Housing Authority Management Handbook continues, to petitioner's knowledge, to "recommend" that each local authority's lease be drawn on a month-to-month basis whenever possible. "This should permit any necessary

local authority *will* have to state and discuss a reason for eviction in an informal conference with the tenant. The Authority should not, of course, be free *either* to begin summary eviction procedures without complying with the notice and hearing requirements of the circular, *or* to give statutory notice under its lease and thereafter to institute and prosecute summary eviction proceedings on the basis of that notice without further reference to the reason stated or the record made at the conference or hearing. Not only should the tenant be allowed, in court, to argue that a judgment of eviction may not be granted to the Authority because no reasons were given or no conference or hearing held as the circular requires, or because the reason disclosed at the conference or hearing is illegal or otherwise improper; if the reason stated at the conference is proper on its face, the tenant must also be permitted to contest its application to his or her case. Otherwise, under standard summary eviction law, every housing authority would retain the power to deny a desperately needed public benefit without any adequate determination on the issue whether the reason required by the circular and stated by the Authority has the slightest substance or basis in fact.[45] If the protections decreed by HUD in the administrative process are to be meaning-

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evictions to be accomplished . . . upon the giving of a statutory Notice to Quit." (Pt. IV, Sec. 1(d)). Of course, the genesis of this recommendation was the desire to be able to evict suspected "subversives" without having to prove their subversiveness or being faced with a constitutional challenge to the eviction. See *supra*, pp. 31-32.

[45] Cf. *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir. 1961):

> The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case.

See also, *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964).

ful, this Court must make clear that adequate procedures for their judicial enforcement must be followed, whether under the circular or under the Constitution.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX I

Excerpts from the United States Housing Act of 1937

42 U.S.C. § 1401 et seq.

§ 1401. Declaration of policy

It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban and rural nonfarm areas, that are injurious to the health, safety, and morals of the citizens of the Nation. In the development of low-rent housing it shall be the policy of the United States to make adequate provision for larger families and for families consisting of elderly persons. It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this chapter while effecting economies. Sept. 1, 1937, c. 896, § 1, 50 Stat. 888; July 15, 1949, c. 338, Title III, § 307(a), 63 Stat. 429; Sept. 23, 1959, Pub.L. 86-372, Title V, § 501, 73 Stat. 679.

§ 1404a. Public Housing Administration; right to sue; employment of personnel; delegation of functions; rules and regulations; expenses

The Public Housing Administration shall sue and be sued only with respect to its functions under this chapter,

and sections 1501–1505 of this title. The Public Housing Commissioner may appoint such officers and employees as he may find necessary, which appointments, notwithstanding the provisions of any other law, after August 10, 1948, shall be made under this section, and shall be subject to the civil-service laws and the Classification Act of 1949, as amended; delegate any of his functions and powers to such officers, agents, or employees of the Public Housing Administration as he may designate; and make such rules and regulations as he may find necessary to carry out his functions, powers, and duties. Funds made available for carrying out the functions, powers, and duties of the Administration (including appropriations therefor, which are authorized) shall be available, in such amounts as may from year to year be authorized by the Congress, for the administrative expenses of the Administration. Notwithstanding any other provisions of law except provisions of law enacted after August 10, 1948 expressly in limitation hereof, the Public Housing Administration, or any State or local public agency administering a low-rent housing project assisted pursuant to this chapter or sections 1501–1505 of this title, shall continue to have the right to maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action is authorized by the statute or regulations under which such housing accommodations are administered, and, in determining net income for the purposes of tenant eligibility with respect to low-rent housing projects assisted pursuant to this chapter and sections 1501–1505 of this title, the Public Housing Administration is authorized, where it finds such action equitable and in the public interest, to exclude amounts or portions thereof paid by the United

States Government for disability or death occurring in connection with military service. Aug. 10, 1948, c. 832, Title V, § 502(b), 62 Stat. 1284; Oct. 28, 1949, c. 782, Title XI, § 1106(a), 63 Stat. 972.

§ 1408. Same; rules and regulations

The Administration may from time to time make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter. Sept. 1, 1937, c. 896, § 8, 50 Stat. 891; 1947 Reorg.Plan No. 3, §§ 1, 4(a), 9 eff. July 27, 1947, 12 F.R. 4981, 61 Stat. 954.

§ 1410. Annual contributions in assistance of low rentals—Authorization

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MAXIMUM INCOME LIMITS; ADMISSION POLICIES

(g) Every contract for annual contributions for any low-rent housing project shall provide that—

(1) the maximum income limits fixed by the public housing agency shall be subject to the prior approval of the Administration and the Administration may require the agency to review and revise such limits if the Administration determines that changed conditions in the locality make such revisions necessary in achieving the purposes of the chapter;

(2) the public housing agency shall adopt and promulgate regulations establishing admission policies which shall give full consideration to its responsibility for the rehousing of displaced families, to the applicant's status as a serviceman or veteran or relationship to a serviceman or veteran or to a disabled serviceman or veteran, and to the applicant's age or disability, housing conditions, urgency

strated to the satisfaction of the Administration that a gap of at least 20 per centum (except in the case of a displaced family or an elderly family) has been left between the upper rental limits for admission to the proposed low-rent housing and the lowest rents at which private enterprise unaided by public subsidy is providing (through new construction and available existing structures) a substantial supply of decent, safe, and sanitary housing toward meeting the need of an adequate volume thereof; and (iii) unless the public housing agency has demonstrated to the satisfaction of the Administration that there is a feasible method for the temporary relocation of the individuals and families displaced from the project site, and that there are or are being provided, in the project area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of such individuals and families, decent, safe, and sanitary dwellings equal in number to the number of and available to such individuals and families and reasonably accessible to their places of employment.

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Sept. 1, 1937, c. 896, §15, 50 Stat. 895; 1947 Reorg. Plan No. 3, §§1, 4(a), 9, eff. July 27, 1947, 12 F.R. 4981, 61 Stat. 954; July 31, 1947, c. 418, §1, 61 Stat. 704; July 15, 1949, c. 338, Title III, §§301, 303, 304(j), 63 Stat. 422, 424, 427; Aug. 2, 1954, c. 649, Title IV, §401(3), (4), 68 Stat. 631; Aug. 7, 1956, c. 1029, Title IV, §404(c), 70 Stat. 1104. As amended July 12, 1957, Pub.L. 85-104, Title IV, §401(b) (c), 71 Stat. 302; Sept. 23, 1959, Pub.L. 86-372, Title V, §§503(b), 506, 73 Stat. 680; June 30, 1961, Pub.L. 87-70, Title II, §§204(b), 205(b), 206(a), 75 Stat. 164, 165.

Excerpts from the United States Housing Act of 1937

§ 1434. Records; contents; examination and audit

Every contract between the Housing and Home Finance Agency (or any official or constituent thereof) and any person or local body (including any corporation or public or private agency or body) for a loan, advance, grant, or contribution under this chapter, the Housing Act of 1949, as amended, or any other Act shall provide that such person or local body shall keep such records as the Housing and Home Finance Agency (or such official or constituent thereof) shall from time to time prescribe, including records which permit a speedy and effective audit and will fully disclose the amount and the disposition by such person or local body of the proceeds of the loan, advance, grant, or contribution, or any supplement thereto, the capital cost of any construction project for which any such loan, advance, grant, or contribution is made, and the amount of any private or other non-Federal funds used or grants-in-aid made for or in connection with any such project. No mortgage covering new or rehabilitated multifamily housing (as defined in section 1715r of Title 12) shall be insured unless the mortgagor certifies that he will keep such records as are prescribed by the Federal Housing Commissioner at the time of the certification and that they will be kept in such form as to permit a speedy and effective audit. The Housing and Home Finance Agency or any official or constituent agency thereof and the Comptroller General of the United States shall have access to and the right to examine and audit such records. This section shall become effective on the first day after the first full calendar month following the date of approval of the Housing Act of 1961. Aug. 2, 1954, c. 649, Title VIII, §814, 68 Stat. 647. As amended June 30, 1961, Pub.L. 87-70, Title IX, §908, 75 Stat. 191.

APPENDIX II

Excerpts from the North Carolina "Housing Authorities Law"

Gen. Stats. of North Carolina, § 157-1 et seq.

§ 157-2. Finding and declaration of necessity

It is hereby declared that unsanitary or unsafe dwelling accommodations exist in urban and rural areas throughout the State and that such unsafe or unsanitary conditions arise from overcrowding and concentration of population, the obsolete and poor condition of the buildings, improper planning, excessive land coverage, lack of proper light, air and space, unsanitary design and arrangement, lack of proper sanitary facilities, and the existence of conditions which endanger life or property by fire and other causes; that in such urban and rural areas many persons of low income are forced to reside in unsanitary or unsafe dwelling accommodations; that in such urban and rural areas there is a lack of safe or sanitary dwelling accommodations available to all the inhabitants thereof and that consequently many persons of low income are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the State and impair economic values; that these conditions cannot be remedied by the ordinary operation of private enterprise; that the clearance, replanning and reconstruction of such areas and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired; that it is in the public interest that work on such projects be instituted as soon as possible; and that the necessity for the provisions hereinafter enacted is hereby declared as a matter of legislative deter-

mination to be in the public interest. (1935, c. 456, s. 2; 1938, Ex. Sess., c. 2, s. 14; 1941, c. 78, s. 2.)

§ 157-4. Notice, hearing and creation of authority; cancellation of certificate of incorporation

Any twenty-five residents of a city and of the area within ten miles from the territorial boundaries thereof may file a petition with the city clerk setting forth that there is a need for an authority to function in the city and said surrounding area. Upon the filing of such a petition the city clerk shall give notice of the time, place and purposes of a public hearing at which the council will determine the need for an authority in the city and said surrounding area. Such notice shall be given at the city's expense by publishing a notice, at least ten days preceding the day on which the hearing is to be held, in a newspaper having a general circulation in the city and said surrounding area, or, if there be no such newspaper, by posting such notice in at least three public places within the city, at least ten days preceding the day on which the hearing is to be held.

Upon the date fixed for said hearing held upon notice as provided herein, an opportunity to be heard shall be granted to all residents and taxpayers of the city and said surrounding area and to all other interested persons. After such a hearing, the council shall determine:

(1) Whether insanitary or unsafe inhabited dwelling accommodations exist in the city and said surrounding area, and/or

(2) Whether there is a lack of safe or sanitary dwelling accommodations in the city and said sur-

rounding area available for all the inhabitants thereof.

In determining whether dwelling accommodations are unsafe or insanitary, the council shall take into consideration the following: the physical condition and age of the buildings; the degree of overcrowding; the percentage of land coverage; the light and air available to the inhabitants of such dwelling accommodations; the size and arrangement of the rooms; the sanitary facilities; and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes.

If it shall determine that either or both of the above enumerated conditions exist, the council shall adopt a resolution so finding (which need not go into any detail other than the mere finding) and shall cause notice of such determination to be given to the mayor who shall thereupon appoint, as hereinafter provided, five commissioners to act as an authority. Said commission shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings:

The commissioners shall present to the Secretary of State an application signed by them, which shall set forth (without any detail other than the mere recital):

(1) That a notice has been given and public hearing has been held as aforesaid; that the council made the aforesaid determination after such hearing, and that the mayor has appointed them as commissioners;

(2) The name and official residence of each of the commissioners, together with a certified copy of the appointment evidencing their right to office, the

date and place of induction into and taking oath of office, and that they desire the housing authority to become a public body and a body corporate and politic under this article;

(3) The term of office of each of the commissioners;

(4) The name which is proposed for the corporation; and

(5) The location of the principal office of the proposed corporation.

The application shall be subscribed and sworn to by each of said commissioners before an officer authorized by the laws of the State to take and certify oaths, who shall certify upon the application that he personally knows the commissioners and knows them to be the officers as asserted in the application, and that each subscribed and swore thereto in the officer's presence. The Secretary of State shall examine the application and if he finds that the name proposed for the corporation is not identical with that of a person or of any other corporation of this State or so nearly similar as to lead to confusion and uncertainty he shall receive and file it and shall record it in an appropriate book of record in his office.

When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body and a body corporate and politic under the name proposed in the application; the Secretary of State shall make and issue to the said commissioners a certificate of incorporation pursuant to this article, under the seal of the State, and shall record the same with the application.

Excerpts from the North Carolina "Housing Authority Law"

If the council, after a hearing as aforesaid, shall determine that neither of the above enumerated conditions exist, it shall adopt a resolution denying the petition. After three months shall have expired from the date of the denial of any such petitions, subsequent petitions may be filed as aforesaid and new hearings and determinations made thereon.

In any suit, action or proceeding involving the validity or enforcement of or relating to any contract of the authority, the authority shall be conclusively deemed to have been established in accordance with the provisions of this article upon proof of the issuance of the aforesaid certificate by the Secretary of State. A copy of such certificate, duly certified by the Secretary of State, shall be admissible in evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof.

The Secretary of State is authorized and empowered to revoke or to cancel a certificate of incorporation previously issued to an authority or housing authority upon filing in his office a petition and resolution of the council and a petition and resolution of the authority and its members requesting such revocation or cancellation and when the Secretary of State is satisfied that no indebtedness has been incurred or property acquired by said housing authority. (1935, c. 456, s. 4; 1943, c. 636, s. 7; 1961, c. 987.)

§ 157-9. Powers of authority

An authority shall constitute a public body and a body corporate and politic, exercising public powers, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article, including the following powers in addition to others herein granted:

Excerpts from the North Carolina "Housing Authority Law"

To investigate into living, dwelling and housing conditions and into the means and methods of improving such conditions; to determine where unsafe, or insanitary dwelling or housing conditions exist; to study and make recommendations concerning the plan of any city or municipality located within its boundaries in relation to the problem of clearing, replanning and reconstruction of areas in which unsafe or insanitary dwelling or housing conditions exist, and the providing of dwelling accommodations for persons of low income, and to co-operate with any city municipal or regional planning agency; to prepare, carry out and operate housing projects; to provide for the construction, reconstruction, improvement, alteration or repair of any housing project or any part thereof; to take over by purchase, lease or otherwise any housing project located within its boundaries undertaken by any government, or by any city or municipality located in whole or in part within its boundaries; to manage as agent of any city or municipality located in whole or in part within its boundaries any housing project constructed or owned by such city; to act as agent for the federal government in connection with the acquisition, construction, operation and/or management of a housing project or any part thereof; to arrange with any city or municipality located in whole or in part within its boundaries or with a government for the furnishing, planning, replanning, installing, opening or closing of streets, roads, roadways, alleys, sidewalks or other places or facilities or for the acquisition by such city, municipality, or government of property, options or property rights or for the furnishing of property or services in connection with a project; to arrange with the State, its subdivisions and agencies, and any county, city or municipality

of the State, to the extent that it is within the scope of each of their respective functions, (i) to cause the services customarily provided by each of them to be rendered for the benefit of such housing authority and/or the occupants of any housing projects and (ii) to provide and maintain parks and sewage, water and other facilities adjacent to or in connection with housing projects and (iii) to change the city or municipality map, to plan, replan, zone or rezone any part of the city or municipality; to lease or rent any of the dwelling or other accommodations or any of the lands, buildings, structures or facilities embraced in any housing project and to establish and revise the rents or charges therefor; to enter upon any building or property in order to conduct investigations or to make surveys or soundings; to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, or otherwise any property real or personal or any interest therein from any person, firm, corporation, city, municipality, or government; to acquire by eminent domain any real property, including improvements and fixtures thereon; to sell, exchange, transfer, assign, or pledge any property real or personal or any interest therein to any person, firm, corporation, municipality, city, or government; to own, hold, clear and improve property; to insure or provide for the insurance of the property or operations of the authority against such risks as the authority may deem advisable; to procure insurance or guarantees from a federal government of the payment of any debts or parts thereof secured by mortgages made or held by the authority on any property included in any housing project; to borrow money upon its bonds, notes, debentures or other evidences of indebtedness and to secure the same by pledges of its

revenues, and (subject to the limitations hereinafter imposed) by mortgages upon property held or to be held by it, or in any other manner; in connection with any loan, to agree to limitations upon its right to dispose of any housing project or part thereof or to undertake additional housing projects; in connection with any loan by a government, to agree to limitations upon the exercise of any powers conferred upon the authority by this article; to invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control; to sue and be sued; to have a seal and to alter the same at pleasure; to have perpetual succession; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority; to make and from time to time amend and repeal bylaws, rules and regulations not inconsistent with this article, to carry into effect the powers and purposes of the authority; to conduct examinations and investigations and to hear testimony and take proof under oath at public or private hearings on any matter material for its information; to issue subpoenas requiring the attendance of witnesses or the production of books and papers and to issue commissions for the examination of witnesses who are out of the State or unable to attend before the authority, or excused from attendance; and to make available to such agencies, boards or commissions as are charged with the duty of abating or requiring the correction of nuisances or like conditions, or of demolishing unsafe or insanitary structures within its territorial limits, its findings and recommendations with regard to any building or property where conditions exist

which are dangerous to the public health, morals, safety or welfare. Any of the investigations or examinations provided for in this article may be conducted by the authority or by a committee appointed by it, consisting of one or more commissioners, or by counsel, or by an officer or employee specially authorized by the authority to conduct it. Any commissioner, counsel for the authority, or any person designated by it to conduct an investigation or examination shall have power to administer oaths, take affidavits and issue subpoenas or commissions. An authority may exercise any or all of the powers herein conferred upon it, either generally or with respect to any specific housing project or projects, through or by an agent or agents which it may designate, including any corporation or corporations which are or shall be formed under the laws of this State, and for such purposes an authority may cause one or more corporations to be formed under the laws of this State or may acquire the capital stock of any corporation or corporations. Any corporate agent, all of the stock of which shall be owned by the authority or its nominee or nominees, may to the extent permitted by law exercise any of the powers conferred upon the authority herein. In addition to all of the other powers herein conferred upon it, an authority may do all things necessary and convenient to carry out the powers expressly given in this article. No provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state.

Notwithstanding anything to the contrary contained in this article or in any other provision of law an authority may include in any contract let in connection with a

project, stipulations requiring that the contractor and any subcontractors comply with requirements as to minimum wages and maximum hours of labor, and comply with any conditions which the federal government may have attached to its financial aid of the project. (1935, c. 456, s. 9; 1939, c. 150.)

§ 157-23. Contracts with federal government

In addition to the powers conferred upon the authority by other provisions of this article, the authority is empowered to borrow money and/or accept grants from the federal government for or in aid of the construction of any housing project which such authority is authorized by this article to undertake, to take over any land acquired by the federal government for the construction of a housing project, to take over or lease or manage any housing project constructed or owned by the federal government, and to these ends, to enter into such contracts, mortgages, trust indentures, leases or other agreements as the federal government may require including agreements that the federal government shall have the right to supervise and approve the construction, maintenance and operation of such housing project. It is the purpose and intent of this article to authorize every authority to do any and all things necessary to secure the financial aid and the co-operation of the federal government in the construction, maintenance and operation of any housing project which the authority is empowered by this article to undertake. (1935, c. 456, s. 23.)

§ 157-29. Rentals and tenant selection

It is hereby declared to be the policy of this State that each housing authority shall manage and operate its hous-

ing projects in an efficient manner so as to enable it to fix the rentals for dwelling accommodations at the lowest possible rates consistent with its providing decent, safe and sanitary dwelling accommodations, and that no housing authority shall construct or operate any such project for profit, or as a source of revenue to the city. To this end an authority shall fix the rentals for dwellings in its projects at no higher rates than it shall find to be necessary in order to produce revenues which (together with all other available monies, revenues, income and receipts of the authority from whatever sources derived) will be sufficient

(1) To pay, as the same become due, the principal and interest on the bonds of the authority;

(2) To meet the cost of, and to provide for, maintaining and operating the projects (including the cost of any insurance) and the administrative expenses of the authority; and

(3) To create (during not less than the six years immediately succeeding its issuance of any bonds) a reserve sufficient to meet the largest principal and interest payment which will be due on such bonds in any one year thereafter and to maintain such reserve.

In the operation or management of housing projects an authority shall at all times observe the following duties with respect to rentals and tenant selection:

(1) It may rent or lease the dwelling accommodations therein only to persons who lack the amount of income which necessary (as determined by the

housing authority undertaking the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding;

(2) It may rent or lease the dwelling accommodations only at rentals within the financial reach of such persons;

(3) It may rent or lease to a tenant dwelling accommodations consisting of the number of rooms (but no greater number) which it deems necessary to provide safe and sanitary accommodations to the proposed occupants thereof, without overcrowding; and

(4) It shall not accept any person as a tenant in any housing project if the person or persons who would occupy the dwelling accommodations have an annual net income in excess of five times the annual rental of the quarters to be furnished such person or persons, except that in the case of families with three or more minor dependdents, such ratio shall not exceed six to one; in computing the rental for this purpose of selecting tenants, there shall be included in the rental the average annual cost (as determined by the authority) to occupants of heat, water, electricity, gas, cooking range and other necessary services or facilities, whether or not the charge for such services and facilities is in fact included in the rental.

Excerpts from the North Carolina "Housing Authority Law"

Nothing contained in this section shall be construed as limiting the power of an authority to vest in an obligee the right, in the event of a default by the authority, to take possession of a housing project or cause the appointment of a receiver thereof, free from all the restrictions imposed by this section. (1939, c. 150.)

APPENDIX III

North Carolina Statutes Re Summary Ejectment

Gen. Stats of North Carolina, § 42-26 et seq.

§ 42-26. Tenant holding over may be dispossessed in certain cases

Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:

(1) When a tenant in possession of real estate holds over after his term has expired.

(2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.

(3) When any tenant or lessee of lands or tenements, who is in arrear for rent or has agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated. (4 Geo. II, c. 28; 1868-9, c. 156, s. 19; Code, ss. 1766, 1777; 1905, cc. 297, 299, 820; Rev., s. 2001; C. S., s. 2365.)

North Carolina Statutes Re Summary Ejectment

§ 42-28. Summons issued by justice on verified complaint

When the lessor or his assigns, or his or their agent or attorney, makes oath in writing, before any justice of the peace of the county in which the demised premises are situated, stating such facts as constitute one of the cases described in §42-26 and §42-27, and describing the premises and asking to be put in possession thereof, the justice shall issue a summons reciting the substance of the oath, and requiring the defendant to appear before him or some other justice of the county, at a certain place and time (not to exceed five days from the issuing of the summons, without the consent of the plaintiff or his agent or attorney), to answer the complaint. The plaintiff or his agent or attorney may in his oath claim rent in arrear, and damage for the occupation of the premises since the cessation of the estate of the lessee: Provided, the sum claimed shall not exceed two hundred dollars; but if he omits to make such claim, he shall not be thereby prejudiced in any other action for their recovery. (1868-9, c. 156, s. 20; 1869-70, c. 212; Code, s. 1767; Rev., s. 2002; C. S., s. 2367.)

§ 42-29. Service of summons

The officer receiving such summons shall immediately serve it by the delivery of a copy to the defendant or by leaving a copy at his usual or last place of residence, with some adult person, if any such be found there; or, if the defendant has no usual place of residence in the county and cannot be found therein, by fixing a copy on some conspicuous part of the premises claimed. (1868-9, c. 156, s. 21; Code, s. 1768; Rev., s. 2003; C. S., s. 2368.)

North Carolina Statutes Re Summary Ejectment

§ 42-30. Judgment by default or confession

The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the defendant fails to appear, or admits the allegations of the complaint, the justice shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding two hundred dollars, be claimed in the oath of the plaintiff as due and unpaid, the justice shall inquire thereof, and give judgment as he may find the fact to be. (1868-9, c. 156, s. 22; Code, s. 1769; Rev., s. 2004; C. S., s. 2369.)

§ 42-31. Trial by justice; jury trial; judgment; execution

If the defendant by his answer denies any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be. If either party demands a trial by jury, it shall be granted under the rules prescribed by law for other trials by jury before a justice; and if the jury finds that the allegation in the plaintiff's oath, which entitles him to be put in possession, is true, the justice shall give judgment that the defendant be removed from and the plaintiff put in possession of the demised premises, and also for such rent and damages as shall have been assessed by the jury, and for costs; and shall issue his execution to carry the judgment into effect. (1868-9, c. 156, s. 23; Code, s. 1770; Rev., s. 2005; C. S., s. 2370.)

§ 42-32. Damages assessed to trial

On appeal to the superior court, the jury trying issues joined shall assess the damages of the plaintiff for the

detention of his possession to the time of the trial in that court; and, if the jury finds that the detention was wrongful and that the appeal was without merit and taken for the purpose of delay, the plaintiff, in addition to any other damages allowed, shall be entitled to double the amount of rent in arrears, or which may have accrued, to the time of trial in the superior court. Judgment for the rent in arrears and for the damages assessed may, on motion, be rendered against the sureties to the appeal. (1868-9, c. 156, s. 28; Code, s. 1775; Rev., s. 2006; C. S., s. 2371; 1945, c. 796.)

§ 42-34. Undertaking on appeal when to be increased

Either party may appeal from the judgment of the justice, as is prescribed in other cases of appeal from the judgment of a justice; upon appeal to the superior court either plaintiff or defendant may demand that the same shall be tried at the first term of said court after said appeal is docketed in said court, and said trial shall have precedence in the trial of all other cases, except in cases of exceptions to homesteads: Provided, that said appeal shall have been docketed at least ten days prior to the convening of said court: Provided further, that in the event the trial before the justice of the peace takes place at least fifteen days prior to the convening of said superior court, said appeal shall, upon the demand of either plaintiff or defendant, be docketed in time to be tried at said first term of said superior court after said trial before the justice of the peace: Provided, further, that the presiding judge, in his discretion, may make up for trial in advance any pending case in which the rights of the parties or the public require it; but no execution commanding the

removal of a defendant from the possession of the demised premises shall be suspended until the defendant gives an undertaking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant pays any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land. At any term of the superior court of the county in which such appeal is docketed after the lapse of one year from the date of the filing of the undertaking above mentioned, the tenant, after legal notice to that end has been duly executed on him, may be required to show cause why said undertaking should not be increased to an amount sufficient to cover rents and damages for such period as to the court may seem proper, and if such tenant fails to show proper cause and does not file such bond for rents and damages as the court may direct, or make affidavit that he is unable so to do and show merits, his appeal shall be dismissed and the judgment of the justice of the peace shall be affirmed. (1868-9, c. 156, s. 25; 1883, c. 316; Code, s. 1772; Rev., s. 2008; C. S., s. 2373; 1921, c. 90; Ex. Sess. 1921, c. 17; 1933, c. 154; 1937, c. 294; 1949, c. 1159.)

APPENDIX IV

Circulars and Manual Provisions of the United States Department of Housing and Urban Affairs

Circular of February 7, 1967

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

Washington, D. C. 20410

CIRCULAR
2-7-67

Office of the Assistant Secretary For Renewal
and Housing Assistance

To: Local Housing Authorities
Assistant Regional Administrators for
Housing Assistance
HAA Division and Branch Heads

FROM: Don Hummel

SUBJECT: Termination of Tenancy in Low-Rent Projects

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

Circulars and Manual Provisions of the United States Department of Housing and Urban Affairs
Circular of February 7, 1967

In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

1. Name of tenant and identification of unit occupied.
2. Date of notice to vacate.
3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.
4. Date and method of notifying tenant with summary of any conference with tenant, including names of conference participants.
5. Date and description of final action taken.

The Circular on the above subject from the PHA Commissioner, dated May 31, 1966, is superseded by this Circular.

s/ Don Hummel
Assistant Secretary for Renewal
and Housing Assistance

Circular of May 31, 1966

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
PUBLIC HOUSING ADMINISTRATION

Washington, D. C. 20413

CIRCULAR
5-31-66

To: Local Authorities
Regional Directors
Central Office Division and Branch Heads

FROM: Commissioner

SUBJECT: Termination of tenancy in low-rent projects

The Public Housing Administration has for a number of years recommended that tenant leases be drawn on a month-to-month basis noting that this practice should permit any necessary evictions to be accomplished upon the giving of a notice to vacate. There is as you may be aware growing opposition and challenge from individuals and organizations to the practice of simply giving the statutory notice without stating the reason or reasons therefor.

In connection with the above practice, we strongly urge, as a matter of good social policy, that Local Authorities in a private conference inform any tenants who are given such notices of the reasons for this action.

Also, not all Local Authorities have kept their tenant lease forms current with the result that, in some cases, obsolete and unenforceable lease conditions are being challenged legally. We urge that all Local Authorities review their lease forms and remove any such conditions. Regional Offices will provide advice and assistance in connection with such reviews as may be desired.

s/ Marie C. McGuire
Commissioner

Circular of July 28, 1954

PUBLIC HOUSING ADMINISTRATION
HOUSING AND HOME FINANCE AGENCY
WASHINGTON 25, D.C.

CIRCULAR
7-28-54

To: Local Authorities
Field Office Directors

SUBJECT: Decision in *Rudder* v. *US of A* and Its Importance Re Tenant Lease Forms

The decision made in the case of *John Rudder and Doris Rudder*, Appellants, v. *United States of America*, Appellee, No. 1429 in the Municipal Court of Appeals for the District of Columbia, on June 9, 1954, is one which should be of interest to all Local Authorities as it affects the issuance of Notices To Vacate and the right to evict any tenant, either in the Lanham Act or the low-rent program.

The questions at issue were whether the U.S. Government (National Capital Housing Authority) is required to reveal its reason for seeking to terminate tenancy and whether, if a reason were given, the tenant had the right to defend on the ground that the reason given was improper or unlawful. The Appellate Court stated that the Government, like any private landlord, has the right to terminate a monthly tenancy by serving a statutory Notice To Quit without revealing the reason therefor, providing, that such action is in accord with the existing lease agreement with the tenant. Although, in this case, the lease agreement did provide for termination upon 30 days' notice, the Housing Authority included in the lease a provision that it could be terminated for any one of eight listed reasons. The Appellate Court held that

the Government in citing one such reason in its Notice To Quit was in effect saying that eviction would be sought only for one or more of these eight stated reasons. It therefore held that the Trial Court should have entertained the defense of the tenant. However, because of another more compelling consideration the Appellate Court did not reverse the decision of the Trial Court.

In light of this decision it it suggested that all existing tenant lease forms be review to determine whether there are contained therein any provisions which might be interpreted by a Court as being contrary to a simple monthly tenancy, thus precluding tenancy being terminated by merely giving the statutory Notice To Quit. It is also suggested that all future Notices To Quit cite only the provision of the lease which permits termination within a specified time without reference to any other provision.

(Illegible Signature)
Acting Commissioner

Selected Provisions of the Federal Low-Rent Housing Management Manual

PHA

September 1963 LOW-RENT HOUSING MANUAL 100.2

Description and Distribution of PHA Manuals and Technical Guides

1. *Introduction.* The Public Housing Administration has statutory responsibility for ensuring that the objectives of the U. S. Housing Act of 1937 are achieved. To fulfill this responsibility, it has established minimum requirements for Local Authorities who are planning, constructing, and operating PHA-aided low-rent housing. The basic requirements are set forth in the Preliminary Loan Contract, Annual Contributions Contract, or Administration Contract between the Local Authority and the PHA. Supplementary requirements and advisory material for Local Authorities are contained in manuals, circulars, bulletins, handbooks, and booklets issued by the PHA. This Section 100.2 treats the latter category of material, and gives information of the distribution of copies to Local Authorities.

2. *The System of Directives*

   a. *Manuals.* The PHA manuals contain the requirements which supplement the provisions of the Contracts between the Local Authority and the PHA. The four manuals and the subjects they cover are as follows:

      (1) The Low-Rent Housing Manual states PHA policy and covers necessary Local Authority actions in connection with initiating, planning, and constructing a PHA-aided low-rent housing

project, and also includes introductory Sections 100.1 through 103.1 for use by all Local Authorities in development or management operations;

(2) The PHA Accounting Manual contains a uniform system of accounts to be used by Local Authorities and provides instructions for accounting during the planning, construction, and operation of projects (Sections A14.1 and A14.2 of this Manual relate specifically to small Local Authorities);

(3) The PHA Financing Manual provides instructions for temporary and permanent financing of projects;

(4) The PHA Management Manual contains PHA requirements and covers Local Authority actions in connection with the operation of projects after initial occupancy.

b. *Circulars.* Circulars issued by the PHA are of two types, procedural and nonprocedural. Circulars of a procedural nature contain requirements which have the same effect as manuals; they are temporary additions to or modifications of the manuals pending incorporation of the provisions into the appropriate manual, and are clearly identified as such. Other circulars are merely informative or, if procedural, are for one-time, nonrecurring use and do not affect the manuals or other more permanent publications.

Selected Provisions of the Federal Low-Rent Housing Management Manual

c. *Bulletins, Handbooks, and Booklets*

(1) The Low-Rent Housing Bulletins contain detailed technical treatments of specific subjects and may be either (a) wholly or partially mandatory, or (b) wholly non-mandatory. The distinction is made clear in each bulletin or in the reference to it in the appropriate manual. Originally, the Low-Rent Housing Bulletins were numbered LR-1 through LR-54 but some have become obsolete or have been superseded by sections in the handbook series. Although conversion of other bulletins to the handbook series is planned, bulletins pertaining to development matters are not scheduled for conversion and revisions to these are issued as needed.

(2) The Local Housing Authority Accounting Handbook gives technical suggestions for accomplishing the requirements of the PHA Accounting Manual.

(3) The Local Housing Authority Management Handbook offers suggestions and techniques for housing operation and maintenance.

(4) The Contractor's Handbook covers instructions for use by contractors engaged in constructing PHA-aided housing.

(5) The Architect's Check List booklet presents items for consideration in planning housing for the elderly.

(6) The Income Limits booklet provides guidance in establishing and administering income limits for PHA-aided housing.

(7) The Management of Housing for Senior Citizens booklet lists factors for consideration in operating housing for the elderly.

d. *Material for Architects, Engineers and Contractors.* The Architect's Check List, certain sections of the Low-Rent Housing Manual, and some Low-Rent Housing Bulletins are also needed by architects and engineers; the Contractor's Handbook is needed by construction contractors. To maintain appropriate relationships, such materials should be furnished by the Local Authority to its architects, engineers, and contractors. Additional copies needed for this purpose will be sent by the PHA to the Local Authority on request.

3. *Revisions*

a. *Looseleaf Form.* All supplemental requirements and most advisory materials are issued in looseleaf form and should be inserted in binders and kept current at all times. The looseleaf form facilitates the handling of revisions, additions, and deletions.

Selected Provisions of the Federal Low-Rent Housing Management Manual

HUD
HAA

October 1967 LOW-RENT MANAGEMENT MANUAL Section 3

3.9 *Terminations of Tenancy*

a. It is believed essential that no tenant be given notice to vacate without being told by a duly authorized representative of the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

b. In addition to informing the tenant of the reason(s) for any proposed eviction action, each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

(1) Name of tenant and identification of unit occupied.

(2) Date and copy of notice to vacate.

(3) Specific reason(s) for notice to vacate. (For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.)

(4) Date and method of notifying tenant of reasons and, if by conference with tenant, a summary of any such conferences, including names of conference participants.

(5) Date and description of final action taken.

APPENDIX V

Correspondence re: HUD Interpretation of February 7, 1967, Circular

July 10, 1967

Mr. Don Hummel
Assistant Secretary for Renewal
and Housing Assistance
Department of Housing and Urban
Development
Washington, D. C. 20410

Re: *Thorpe* v. *Housing Authority of the City of Durham*—HUD Circular 2-7-67

Dear Mr. Hummel:

I am an attorney for Mrs. Joyce Thorpe, the petitioner in the case above. As you probably know, the Supreme Court of the United States, on April 17, 1967, remanded the case to the Supreme Court of North Carolina for reconsideration in light of the circular issued under your name by the Department of Housing and Urban Development on February 7, 1967. The Supreme Court of North Carolina has just recently required us to submit briefs in the case by August 1, 1967, in light of the action of the Supreme Court of the United States.

The purpose of this letter is to obtain from the Department of Housing and Urban Development its views as to the present legal status and effect of the February 7th circular, in order to aid us in the preparation of our brief for the Supreme Court of North Carolina. We have a number of questions to which we would appreciate your response.

Correspondence re: HUD Interpretation of February 7, 1967, Circular

1. What is the legal status of the circular?

   (A) Was it intended to be legally binding on local public housing authorities, or merely advisory?

   (B) Is it planned to include the circular in the manual sent to public housing authorities so as to make it binding?

   (C) Has the circular been published in the Federal Register or is it intended that it will be published in the Federal Register?

2. What is the intention of the circular as to the nature of the hearing to be afforded to the tenant? The circular speaks of local authorities telling the tenant "in a private conference or other appropriate manner, the reasons for the eviction" and giving a tenant "an opportunity to make such reply or explanation as he may wish."

   (A) Would an informal conference between the tenant and the housing manager be sufficient to comply with the circular?

   (B) Is the requirement intended to be broader, *e.g.*, the giving of a more formal hearing at the tenant's request before the housing authority board itself, or other body, at which time the tenant would be able to present evidence on her behalf and confront any persons who had made charges against her?

3. Does HUD have any views as to what reasons justify an eviction? Or, may the housing authority terminate the lease for any reasons it feels appropriate?

4. Does HUD intend to enforce the circular by, for example, cutting off funds if the records set out in the circular are not maintained or if notice of reason and opportunity to be heard are not given?

Thank you very much for your consideration.

Very truly yours,

/s/ CHARLES S. RALSTON
Charles Stephen Ralston

CSR:cf
cc: Mr. Joseph Burstein

Correspondence re: HUD Interpretation of February 7, 1967, Circular

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D. C. 20410

C.S.R.
7/27/67

OFFICE OF THE ASSISTANT SECRETARY
FOR RENEWAL AND HOUSING ASSISTANCE

JUL 25 1967

Mr. Charles Stephen Ralston
NAACP Legal Defense and
Educational Fund, Inc.
10 Columbus Circle
New York, N.Y. 10019

Re: Joyce C. Thorpe v. Housing Authority of the City of Durham

Dear Mr. Ralston:

This is in reply to your letter of July 10, 1967, advising that you are an attorney for Mrs. Joyce Thorpe, the petitioner in the above case, and requesting our views as to the present legal status and effect of our February 7, 1967, circular on the subject "Terminations of Tenancy in Low-Rent Projects."

The following are your questions and our answers:

Q. 1. What is the legal status of the circular?
(A) Was it intended to be legally binding on local public housing authorities, or merely advisory?

A. It is our position that the circular is legally authorized under Section 8 of the United States Housing Act of 1937; that it means what it says; and that we intended it to be followed. We assume that the question as to the authority of the Department of Housing and

Correspondence re: HUD Interpretation of February 7, 1967, Circular

Urban Development to make the provisions of the circular mandatory, either in whole or in part, is one that will be answered by the courts in the *Thorpe* case.

Q. (B) Is it planned to include the circular in the manual sent to public housing authorities so as to make it binding?

A. The circular is as binding in its present form as it will be after incorporation in the manual. It is in the process of being so incorporated.

Q. (C) Has the circular been published in the Federal Register or is it intended that it will be published in the Federal Register?

A. It is not intended to publish the circular in the Federal Register. Under the Administrative Procedure Act, prior to its amendment by P.L. 89-487, effective July 4, 1967, publication in the Federal Register was required only for matter which is formulated and adopted "for the guidance of the public." HUD policy over the years has been to treat local housing authorities as contracting parties under the Annual Contributions Contract not covered by the term "public." Material issued from time to time for the guidance of local housing authorities in the implementation of the Annual Contributions Contract has, therefore, not been published in the Federal Register but local authorities are given actual notice of these matters by supplying the material (manuals, bulletins, circulars, and similar publications) directly to the

local authorities. While P.L. 89-437 amended the Administrative Procedure Act as to publication in the Federal Register, the Attorney General's memorandum on that Act, at page 10, states that "rules, policy statements and interpretations which do not concern the public similarly are to be omitted from the Federal Register." We therefore feel justified in continuing the policy of treating local housing authorities as not being part of the "public" for the purposes of the requirement of publication in the Federal Register. A copy of the HUD Regulations under P.L. 89-437 is enclosed for your information and convenience, together with a copy of the Attorney General's Memorandum.

Q. 2. What is the intention of the circular as to the nature of the hearing to be afforded to the tenant? The circular speaks of local authorities telling the tenant "in a private conference or other appropriate manner, the reasons for the eviction" and giving a tenant "an opportunity to make such reply or explanation as he may wish."

(A) Would an informal conference between the tenant and the housing manager be sufficient to comply with the circular?

A. It was our intention that an informal conference would be sufficient compliance with the circular.

Q. (B) Is the requirement intended to be broader, *e.g.*, the giving of a more formal hearing at the tenant's request before the housing authority board itself, or other body, at which time the tenant

would be able to present evidence on her behalf and confront any person who had made charges against her?

A. It was not intended that the housing authority be required to give the tenant a more formal hearing. The question of whether the tenant is entitled to a formal hearing or whether the opportunity afforded the tenant of a full judicial hearing when the Authority attempts to evict him through judicial process is sufficient is one of the issues to be decided by the *Thorpe* case. We would, of course, approve of the housing authorities' adopting a procedure to give the tenant a more formal hearing.

Q. 3. Does HUD have any views as to what reasons justify an eviction? Or, may the housing authority terminate the lease for any reasons it feels appropriate?

A. Of course there are a number of reasons that would justify an eviction, in our opinion, such as destruction of property, breaches of the peace or other boisterous conduct which would disturb other tenants, nonpayment of rent, failure to report an increase in family income, or a number of other reasons which could reasonably be said to impair the successful operation of the project as "decent, safe, and sanitary" housing. Certainly the housing authority may not terminate the lease "for any reasons it feels appropriate" if such reasons are arbitrary or capricious, nor may it evict a tenant as retribution for his exercise of a constitutional right.

Correspondence re: HUD Interpretation of February 7, 1967, Circular

Q. 4. Does HUD intend to enforce the circular by, for example, cutting off funds if the records set out in the circular are not maintained or if notice of reason and opportunity to be heard are not given?

A. HUD intends to enforce the circular to the fullest extent of its ability. Enforcement will probably be accomplished by judicial process or, if necessary, by the take-over and operation of the projects by HUD under the provisions of Section 22 of the USHAct rather than by cutting off funds to the local housing authority. This is primarily because we consider these remedies sufficient and more constructive than cutting off funds, and further because the full faith and credit of the United States is pledged to the payment of the bonds and other obligations of local housing authorities, which, in turn, depends on the availability of these funds. Section 22 of the USHAct requires that these funds (annual contributions) must continue until the securities are paid, regardless of any act or omission of the local housing authority.

We trust that these are sufficient answers to your questions.

Sincerely yours,

/s/ DON HUMMEL

Don Hummel
Assistant Secretary

Enclosures

Correspondence re: HUD Interpretation of February 7, 1967, Circular

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
HOUSING ASSISTANCE ADMINISTRATION
Washington, D.C. 20413

C.S.R.
8/8/67
AUG 7 1967

Mr. Charles Stephen Ralston
NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle
New York, N. Y. 10019

Dear Mr. Ralston:

Reference is made to your letter of July 10, 1967, enclosing copy of letter you sent to Mr. Hummel asking for HUD's opinion on the status and effect of the February 7, 1967, Circular regarding evictions from public housing. Your letter asks that I also give you my views as to the questions asked in your letter.

I am familiar with Mr. Hummel's reply dated July 25, 1967, to your letter and my views are the same as those expressed by him.

Sincerely yours,

/s/ JOSEPH BURSTEIN

Joseph Burstein
Chief Counsel

APPENDIX VI

Opinion of March 11, 1968

NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

In the matter of

BENNIE VINSON, *et al.*,

Respondents,

—v.—

GREENBURGH HOUSING AUTHORITY,

Appellant.

Decided March 11, 1968

Before:

BELDOCK, *P.J.*;

CHRIST, BRENNAN, HOPKINS and MUNDER, *JJ.*

Appeal (by permission) from an order of the Supreme Court at Special Term (Joseph F. Hawkins, J.), entered August 15, 1966, in Westchester County, (1) granting petitioners' application pursuant to CPLR, article 78, to annul appellant's determination to institute summary proceedings to evict petitioners, unless appellant submit a further return, and (2) directing that the summary proceedings be stayed pending a final determination of this proceeding, on condition that petitioners continue to pay rent.

Opinion of March 11, 1968

Bleakley, Platt, Schmidt, Hart & Fritz (John C. Marbach of counsel), *for appellant.*

Levine & Frost and Rudolph D. Raiford (Robert P. Levine of counsel); *for respondents.*

HOPKINS, *J.*

The petitioners in this proceeding under CPLR, article 78, are husband and wife and the tenants in a housing project owned and managed by the appellant, the Greenburgh Housing Authority (hereafter called "Authority"). The Authority exists as a public corporation through act of the Legislature (Public Housing Law, sec. 3, subdiv. 2; sec. 457). The petitioners have occupied an apartment under a written lease since July 16, 1962.

The lease provides for a term of one month, to be automatically renewed for successive terms on one month, unless terminated by either party upon giving one month's prior notice in writing. The rental is stipulated at $66 a month, which may be increased in the event that the petitioners' family income shall have increased beyond a certain ratio to that rental.

On March 29, 1966, a written notice of termination of the lease was given by the Authority to the petitioners, effective April 30, 1966. The notice states no reason for the termination. The petitioners did not comply with the notice and on May 3, 1966, the Authority commenced summary proceedings to evict the petitioners in the Justice's Court of the Town of Greenburgh. This proceeding to annul the determination of the Authority to evict the petitions and to stay the summary proceedings followed on May 12, 1966.

The petitioners allege that the regulations of the Authority establish a standard of eligibility and conduct for continued occupancy by its tenants, that is, so long as the tenants do not constitute a detriment to the health, safety and morals of their neighbors or to the community or an adverse influence on sound family and community life, or a source of danger to the premises or the peaceful occupation of other tenants. Further, they allege that, upon receipt of the notice of termination of their lease, the petitioner-wife was told by the attorney for the Authority that she and the children of the family would be permitted to remain as tenants, provided that she compel her husband to leave the apartment and that she seek public welfare assistance and an order of support by her husband in the Family Court; and that she refused to comply with this instruction. In further support of their proceeding, the petitioners submitted an affidavit by their attorney who stated therein that the attorney for the Authority had refused to discuss the matter with him or to give any reason for the eviction, other than the termination of the lease itself.

The Authority's return alleges no reason for the termination of the lease; it admits that the petitioners' attorney spoke to its attorney, who informed the former that the Authority was not required to give a reason for the eviction. The Authority claims as a defense that the notice validly terminated the lease and that its determination was neither a judicial nor a quasi-judicial act and hence not reviewable by the court.

Special Term in effect granted the relief sought by the petitioners, unless the Authority submit an appropriate return stating the grounds for its determination. Special Term reasoned that the petitioners has asserted grave

charges of irresponsibility by the Authority and that the latter's contention that its exercise of discretion to terminate the lease was absolute could not be sustained. By permission of Special Term, the Authority appeals (CPLR 5701, subdiv. [c]).

The Authority argues that the provisions in the lease for its termination are plain and binding on both parties and cannot be modified by the court. To interfere with its determination by requiring an explanation, the Authority urges, imposes a burden not demanded from other landlords and thus discriminates unfairly and invalidly against it. On the other hand, the petitioners press on us the contention that the Authority may not act arbitrarily toward its tenants, for otherwise a tenant might be evicted without cause or justification.

We meet, then, the question of the nature of the relationship between a housing authority and its tenants. Ordinarily, provisions in a lease permitting its termination upon the service of a notice of a stated period are enforcible by the landlord at will (*Zule* v. *Zule*, 24 Wend. 76; cf. *Metropolitan Life Ins. Co.* v. *Carroll*, 43 Misc. 2d 693). The relationship between landlord and tenant is considered contractual simply; and the terms of the lease for termination, unless calling for a reasonable basis for action, may be exercised without explanation. But a housing authority is not an ordinary landlord, nor its lessees ordinary tenants.

Our constitution recognizes low rent housing as a proper governmental function (N. Y. Const., Art. XVIII). The Legislature, in response to its direction, has enacted the Public Housing Law. The statute empowers the construction of housing through the agency of authorities (Public Housing Law, sec. 30), which may appoint a general man-

ager (id., sec. 32), make bylaws and regulations (id., sec. 37, subdiv. 1, par. [w], and conduct hearings (id., sec. 3, subdiv. 1, par. [x]). The authorities are empowered to select tenants qualified as persons of low income (id., sec. 156), under leases which provide for rents adjustable according to income (id., sec. 37, subdiv. 1, par. [k]).

Thus, our state has distinguished low rent housing as a human need to be satisfied through governmental action and has created by specific statutory provisions the structure of the relationship between the housing authority and the tenant. The statute consequently enters into and becomes a part of the lease; and its spirit and intent must be the guiding beacon in the interpretation of the terms of the lease.

"'Due process of law,' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature" (*Stuart* v. *Palmer*, 74 N. Y. 183, 190-191). Once the state embarks into the area of housing as a function of government, necessarily that function, like other governmental functions, is subject to the constitutional commands. Low rent housing is not the leasing of government-owned property originally acquired for a different purpose, but now surplus or not required for that purpose, on a sporadic or temporary basis (cf. *United States* v. *Blumenthal*, 315 F. 2d 351), where the traditional notions of private property might well be applied; rather, it imports a status of a continuous character, based on the need of the tenants for decent housing at a cost proportionate to their income, subject to the compliance by the tenants with reasonable regulations and the payment of rent when due. "The Government as landlord is still the government. It must

not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law" (*Rudder* v. *United States,* 226 F. 2d 51, 53).

What may be complete freedom of action under private contractual arrangements falls to restricted action under public housing leases (cf. *Housing Authority of City of Los Angeles* v. *Cordova,* 130 Cal. App. 2d 883, cert. den. 350 U.S. 969; *Kutcher* v. *Housing Authority of City of Newark,* 20 N. J. 181; *Chicago Housing Authority* v. *Blackman,* 4 Ill. 2d 319; *Lawson* v. *Housing Authority of City of Milwaukee,* 270 Wis. 269; *Edwards* v. *Habib,* 227 A. 2d 388, D. C. App.). We think that a housing authority cannot arbitrarily deprive a tenant of his right to continue occupancy through the exercise of a contractual provision to terminate the lease. In other words, the action of the housing authority must not rest on mere whim or caprice or an arbitrary reason.

Several considerations combine to justify the difference in treatment between governmental agencies and private individuals. Realistically, it must be acknowledged that the housing authority prescribes the terms of the lease and that the tenant does not negotiate with the authority in the usual sense (see Reich, The New Property, 73 Yale L. J. 733, 749-752; Friedman, Public Housing and the Poor: An Overview, 54 Cal. L. Rev. 642, 60; note, Government Housing Assistance to the Poor, 76 Yale L. J. 508, 512). In this condition of affairs, to impose a requirement of good faith and reasonableness on the party in the stronger bargaining position when he exerts a contractual option is but a reflection of simple justice (cf. *N. Y. Central Iron Works Co.* v. *United States Radiator Co.,* 174 N. Y. 331; *Wood* v. *Duff-Gordon,* 222 N. Y. 88).

That requirement, even before the advent of housing as a public function, was read into municipal agreements dealing with the use of governmental facilities (*Gushee* v. *City of N. Y.*, 42 App. Div. 37, 18; cf. *Lincoln Safe Deposit Co.* v. *City of N. Y.*, 210 N. Y. 34, 40). In *Gushee* (supra), thus, it was said (pp. 48-49):

> "But if at any time in the future it shall determine in good faith to take away the restaurant, the plaintiff must submit, because he takes his agreement subject to the power which the law has given to make these regulations. Until, however, some such regulation is made the plaintiff has the right to his contract and to the protection of the court to prevent any capricious or unnecessary interference with it."

Moreover, in balancing the interests of the state against the interests of the individual, the advantages to the state are outweighed by the detriment to the individual, if we were to deny the tenant protection from an arbitrary termination of the lease. The eviction of a family in the income bracket eligible under the standards of public housing from its household is a serious blow. If, in fact, a mistake has been made in the accusation against the tenant of improper conduct or a violation of regulations, or if the reason for the ouster has no better basis than dislike or unjustified discipline, the requirement of the disclosure of the ground for the termination of the lease affords the tenant the opportunity to protest its exercise. On the other hand, the authority will suffer no more than delay in the ultimate eviction in the event the termination of the lease is made on reasonable grounds; and in the meantime the authority may control excessive misbehavior of the tenant through police action.

The declared purpose of the statute makes clear that low rent housing was considered to be permanent and not transitory and that, so long as the tenants remain qualified and do not violate the reasonable regulations of the state agency, they would not be evicted for grounds extrinsic to these requirements. So, the state policy was established in contemplation of "insanitary and substandard housing conditions owing to overcrowding and concentration of the population," as a result of which "the construction of new housing facilities, under public supervision in accord with proper standards of sanitation and safety and at a cost which will permit monthly rentals which persons of low income can afford to pay" is necessary; and it was acknowledged that "these conditions require the creation of the agencies, instrumentalities and corporations, hereinafter prescribed, which are declared to be agencies and instrumentalities of the state for the purpose of attaining the ends herein recited" (Public Housing Law, sec. 2).

To be sure, some state courts have held that a housing agency may terminate a lease with a tenant with similar provisions in the same manner as a private landlord (*Housing Authority of City of Durham* v. *Thorpe,* 267 N. C. 431, vacated and remanded 368 U. S. 670; *Pittsburgh Housing Authority* v. *Turner,* 201 Pa. Super. 62; *Columbus Metropolitan Housing Authority* v. *Simpson,* 85 Ohio App. 73; *Chicago Housing Authority* v. *Ivory,* 341 Ill. App. 282). We think that the better rule is that the housing agency must have a reasonable ground for termination.

In *Thorpe* (supra), the petitioner was a tenant in a federally-assisted public housing project in North Carolina. The lease was terminable by either party upon fif-

teen days' notice. The petitioner was elected president of a tenants' organization about a year after the beginning of occupancy. The housing authority on the day following the election gave notice of termination. It refused to give any reason to the petitioner for the termination. Thereafter it brought eviction proceedings against her. In the proceedings it was stipulated that the authority had not terminated the tenancy because of the petitioner's election as president of the tenants' organization, but the stipulation did not state the reason for the termination. The Supreme Court of North Carolina affirmed a judgment in favor of the authority, saying that it was immaterial what may have been the reason for the authority's disinclination to continue the petitioner's occupancy.

The Supreme Court of the United States vacated the judgment and remanded the proceedings to the courts of North Carolina. The majority of the court found that a directive issued by the Federal Department of Housing and Urban Development subsequent to the notice of termination had stated that it was essential that no such notice should be given unless the tenant be told the reason for his eviction; and held that the procedure prescribed by the directive governed the disposition of the appeal. It is implied by the decision that the petitioner should be accorded on the remand the treatment provided by the directive. In a concurring opinion, Mr. Justice Douglas held that the North Carolina courts should determine the reason for the petitioner's eviction. Thus, he said (386 U.S. 670, 678):

> "Over and over again we have stressed that 'the nature and the theory of our institutions of government, the principles upon which they are supposed to rest . . . do not mean to leave room for the play

and action of purely personal and arbitrary power' (*Yick Wo* v. *Hopkins*, 118 U.S. 356, 369-370) and that the essence of due process is 'the protection of the individual agaist arbitrary action' (*Ohio Bell Telephone Co.* v. *Public Utilities Comm'n*, 301 U.S. 292 302; *Slochower* v. *Board of Education*, 350 U.S. 551, 559). Any suggestion to the contrary 'resembles the philosophy of feudal tenure' (Reich, The New Property, 73 Yale L. J. 733, 769). It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with, and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment. 'The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process' (*Rudder* v. *United States*, 96 U.S. App. D. C. 329, 331, 226 F. 2d 51, 53)."

Again, he said (id., pp. 679-681):

This does not mean that a public housing authority is powerless to evict a tenant. A tenant may be evicted if it is shown that he is destroying the fixtures, defacing the walls, disturbing other tenants by boisterous conduct and for a number of other reasons which impair the successful operation of the housing project. Eviction for such reasons will completely protect the viability of the housing project without making the tenant a serf who has a home at the pleasure of the manager of the project or the housing authority.

"Here, the Superior Court found that petitioner had not been evicted because she had engaged in efforts to organize the tenants of the housing project or because she had been elected president of the Parents' Club. On appeal to the North Carolina Supreme Court, petitioner contended that the finding was erroneous. The State Supreme Court did not pass on the finding of the Superior Court since it concluded that the Housing Authority could terminate the lease and evict petitioner for any reason. As I have said, it is argued that the circular of the Department of Housing and Urban Development answers petitioner's claim that she was entitled to an administrative hearing before her lease was terminated. But petitioner has already had a hearing in the state courts. And the status of the circular, whether a regulation or only a press release, is uncertain, an uncertainty which the Court does not remove. Vacating and remanding 'for such further proceedings as may be appropriate in light of the . . . circular' therefore furnishes no guidelines for the state courts on remand, and does not dispose of the basic issue presented. I would vacate and remand to the state courts to determine the precise reason why petitioner was evicted and whether that reason was within the permissible range for state action against the individual."

The Authority here notes that it is not subject to federal supervision, as no federal funds were received as assistance in the project, and argues that the suggested procedure is therefore not applicable to it. Strictly speaking, this is so, but we do not believe that it makes a material difference in the result. The rights of the peti-

tioners should be safeguarded to prevent the use of arbitrary power.

Doubtless, there exist areas of such sensitivity in the relations between state and individual that rules of finality will be enforced, even as against the charge of arbitrariness—i.e., eminent domain, taxation and tariffs. But, even in such cases, the circumstances dictate the effect to be given to the constitutional rights. "It [the court] has weighed the relative values of constitutional rights, the essentials of powers conferred, and the need of protecting both" (*St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 81 [concurring opinion of Mr. Justice Brandeis]). The unrestricted exercise of power by administrative officials has increasingly been made the subject of judicial scrutiny (cf. *Sleepy Hollow Val. Committee* v. *McMorran*, 20 N. Y. 2d 190; *Matter of Brown* v. *McMorran*, 23 A. D. 2d 661).

Once the field of housing as a utility has been encompassed by the state, we think that the traditional protection against the caprice of state agencies must be preserved. "Discretionary administrative power over individual rights . . . is undesirable per se, and should be avoided as far as may be, for discretion is unstandardized power and to lodge in an official such power over person or property is hardly conformable to the 'Rule of Law'" (Freund, Historical Survey in Growth of America, Administrative Law, pp. 22-23).

The order below should be affirmed, with $10 costs and disbursements.

Brennan and *Munder, JJ.*, concur.

Opinion of March 11, 1968

BELDOCK, *P.J.* (dissenting)—

The basic issue raised by this proceeding is whether a public corporation, such as the appellant Greenburgh Housing Authority, may assert the same right as a private corporation or individual to terminate a month-to-month tenancy, pursuant to the provisions of the operative lease, without giving a reason for its action.

The majority of this court concedes that if the appellant were a private landlord there would be no question that the lease between the parties could be terminated, without reason, by virtue of its provisions allowing termination by the giving of the required notice by either party. Although I am in sympathy with the plight of the petitioners if they are to be evicted from their apartment, nevertheless, I am of the opinion that, in the absence of a clear expression of legislative intent to the contrary, the Authority is under no obligation to give a reason in support of its determination to terminate the tenancy. It was said in *Brand* v. *Chicago Housing Authority* (120 F. 2d 786, 789): "We do not doubt, as pointed out by plaintiffs, but that their eviction will result in hardships. This is a result which inevitably follows upon the termination of any lease which, by its terms, has been advantageous to the lessee. Such a consequence, however, regrettable as it is, can not determine the rights of the parties as fixed by law and the terms of the lease."

In my opinion, the public nature of the Authority's activities and purposes does not affect its right to rely on the express provisions of the lease. There is no obligation either under the terms of the lease or by statutory or constitutional law which compels the Authority to give reasons for the termination of the lease. The petitioners' position rests largely on the underlying premise, although

not specifically urged, that by reason of their acceptance as tenants they acquired a vested property right which could not be destroyed by what is claimed to have been the unreasonable and arbitrary act of the Authority in terminating the lease without giving the reasons therefor. However, the petitioners have no inherent right to the continuation of their tenancy in the public housing project. Any property rights acquired by them were circumscribed by the terms and conditions of the lease upon which they were founded. "It is our opinion that this provision with reference to the termination of the tenancy is valid and binding upon plaintiffs in the same manner as though the lessor had been a private person rather than a Governmental Agency" (*Brand* v. *Chicago Housing Authority*, 120 F. 2d 786, 788, *supra; Lynch* v. *United States*, 292 U.S. 571).

I do not believe that the Legislature, in enacting the Public Housing Law, intended that a housing authority be required to give notice of the reasons for the termination of a lease whenever it exercises its right to terminate a month-to-month tenancy pursuant to the provisions of a written lease. On the contrary, if a housing authority were compelled to submit to interrogation and investigation of its reasons for desiring possession of its property at the expiration of each tenant's lease, it would place an unreasonable restraint on its powers and make it more difficult for it to carry out the policies declared by the Legislature (*Housing Authority of City of Pittsburgh* v. *Turner*, 201 Pa. Super. 62, 191 A. 2d 869).

In *Thorpe* v. *Housing Authority of City of Durham* (386 U.S. 670), the Supreme Court of the United States failed to reach the constitutional issues now raised by

the petitioners. The Supreme Court vacated the judgment of the state court on the ground that after certiorari had been granted the United States Department of Housing and Urban Development issued a circular to local housing authorities which required federally-assisted housing authorities (not herein involved) to disclose the reasons for the termination of leases of their tenants; and held that the procedures described in the circular should be followed in that case. With respect to the petitioner's contention that she was constitutionally entitled to notice setting forth the reasons for the termination of her lease, and a hearing thereon, the court stated at pages 671-672: "We find it unnecessary to reach the large issues stirred by these claims, because of a significant development that has occurred since we granted the writ of certiorari."

In the absence of any controlling judicial authority to the contrary, I am of the opinion that the petitioners have not been denied due process or deprived of any constitutional right by reason of the actions of the Authority herein. Accordingly, I would reverse the order under review, dismiss the proceeding on the merits, and confirm the determination of the Greenburgh Housing Authority.

Christ, J., concurs.